91-673

No. _____

In the Supreme Court of the United States

October Term, 1991

SHERMAN BLOCK, SHERIFF OF
LOS ANGELES COUNTY,
COUNTY OF LOS ANGELES; LOS ANGELES COUNTY
SHERIFF'S DEPARTMENT; JOHN P. KNOX,

Petitioners,

v.

SUSAN L. BOUMAN, on behalf of herself and
all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether respondent has standing to:

   a. Challenge an examination which she passed and after the statute of limitations has run;

   b. Challenge an examination which she did not apply for;

   c. Represent a class on an "across the board" basis without compliance with Federal Rule Civil Procedure 23 prerequisites and without an evidentiary hearing to determine what common questions of law and fact, if any, exist between plaintiff and the purported class?

2. Whether adverse impact based on gender under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C Section 2000e, *et seq.* may be found against an employer from neutral, objective selection devices when:

   a. Such finding of adverse impact is based upon statistics which are unreliable and the disparity insubstantial;

   b. Any difference in performance occurs from the effect of factors other than gender?

3. Whether a claim of retaliation can be stated in a civil complaint when no timely charge of retaliation, as required under Title VII, has been filed?

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Statutes

No. _____

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SUSAN L. BOUMAN, on behalf of herself and
all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners, and each of them, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 23, 1991.

OPINION BELOW

Appendix A hereto contains a copy of the opinion of the Court of Appeals, of which petitioners seek review, cited as *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991).

Appendix B is the Amended Memorandum after Trial filed by the District Court.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered July 23, 1991. This petition was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

The basic facts as affirmed by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") are set forth in its opinion, reproduced at Appendix "A" hereto, and will not be reiterated at length.

When respondent took the sergeant examination in 1975, she was a successful candidate. She passed the written test. She received an appraisal of promotability score of 100, the highest possible score. She advanced to the oral interview and received a score of 87. As a result of her combined score on all parts of the examination, she achieved an eligibility number of 120 on the initial certified eligible list. As a result of appeals of other candidates respondent's rank was changed to 131. There were 131 appointments made. Respondent was not promoted because two candidates with the same eligible number ranked above her. These facts are not in dispute.

As stated in the Ninth Circuit opinion, respondent did not apply for the 1977 sergeant examination. That fact is also not disputed, although the reasons for respondent's failing to apply for the 1977 examination are strongly disputed.

CLASS CERTIFICATION

On November 10, 1980, the District Court certified the class described by the Ninth Circuit. It did so orally and, in petitioners' view, erroneously. It found all Rule 23 requirements satisfied. Numerosity was shown based on respondent's allegation that she represented several hundred past applicants and thousands of future applicants; common questions of fact and law were found simply because "plaintiff is attacking defendants' discriminatory practices against females"; typicality was found based on respondent's contention that "defendants' practices have the same effect on all class members" and injunctive relief was sought; adequate representation and standing to raise class claims was found because "plaintiff is challenging the existing examination on behalf of all of those subjected to such an exam."

While admitting a doubt as to 23(b)(1) being satisfied, the District Court found 23(b)(2) to have been satisfied simply because the tests were alleged to be discriminatory toward women and plaintiff sought injunctive relief.

The District Court found the class not to be overbroad and that a *prima facie* case had been stated simply because respondent had provided statistics as to the "relevant applicant's pool." Without stating specifically the basis for its conclusion, the District Court found that the class definition was sufficiently specific. In regard to the scope of the class, the District Court, while admitting it could not understand petitioners' argument regarding the inappropriateness of including future applicants as too speculative, found it to be appropriate.

In regard to the question of whether respondent had established sufficient nexus to class claims, the District Court simply stated that it relied upon the "Sierra Club decision" without further explanation.

The District Court's conclusions were based solely on the complaint (CT 1) and respondent's motion for class certification, accompanied by declarations of respondent and her counsel (CT 27). Such declarations were objected to by defendants in their opposition to respondent's motion as being incompetent, lacking foundation and stating not facts but conclusions which declarants were unqualified to make, *inter alia* (CT 39). A supplemental declaration of respondent to which petitioners had no opportunity to respond was also submitted but added nothing of substance (CT 43). The Ninth Circuit affirmed the District Court's Certification of the Class under an abuse of discretion standard.

ADVERSE IMPACT

In affirming the District Court's finding of adverse impact the Ninth Circuit relied upon statistics which showed a violation of the "80% rule" set forth in the Uniform Guidelines on Employee selection procedures ("Uniform Guidelines") at 28 C.F.R. §50.14 at §4(D)(1978). It did not, however, consider the rest of §4(D) which states in pertinent part:

> Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group.

Based on the foregoing provision of the Uniform Guidelines petitioners proffered evidence, which was essentially unrebutted by respondent, challenging the statistical significance of respondent's statistics showing disparity of performance on the 1975 and 1977 sergeant

examinations, initially at the "bottom line" and later for discrete parts of both examinations. Only by *combining* results of the 1975 and 1977 examination was respondent able to establish statistical significance in some cases.

Not only did petitioners, in their view, demonstrate the unreliability of respondents' statistics, they also demonstrated that even if respondents' statistics were reliable, they showed insubstantial differences. The Ninth Circuit acknowledged the insubstantial nature of the difference in selection (940 F.2d at 1226, footnote 2: 1 additional woman promoted in 1977 would have brought the rate of promotion within 80% that of men; 3 additional women promoted in 1975 would have made the rate of promotion 92% that of men.) The Ninth Circuit did not address the insubstantial nature of the difference directly, stating instead that the difference was *statistically* significant, which addresses whether the difference could occur by chance, not its substance.

Defendants proffered evidence that the actual source of the disparity was the effect of intensified recruitment of women and experience in the Sheriff's department and in taking the sergeant examination. That evidence was not refuted by respondents but criticized as not having been done before (RT, June 3, 1986, pps. 41, 42, 44-46, 49, 62, 75, 81, 83, etc.). The Ninth Circuit mistakes petitioners' evidence as evidence in lieu of validation when it clearly is intended to dispute respondents' *prima facie* case of adverse impact.

RETALIATION

It is undisputed that respondent did not ever file a charge of retaliation with the EEOC as she is required to do under Title VII (Amended Memorandum after

trial, B-8, C.R. 284); nevertheless, the District Court held and the Ninth Circuit affirmed that respondent's claim of retaliation was reasonably related to her prior EEOC charge of discrimination. The Ninth Circuit did not explain how discrimination and retaliation, which are set forth in different sections of Title VII, §2000e—2(a) as opposed to §2000e—3(a), respectively, could reasonably relate to one another.

REASONS FOR GRANTING THE WRIT

There are two(2) reasons for granting the writ:

1. The Ninth Circuit affirmance of the District Court's decision conflicts with the rulings of this Court, as well as its own rulings in other cases.

2. The questions presented are of sufficient importance for this Court to address because they involve fundamental issues which, if not addressed, will:

a. Encourage litigation by persons without standing;

b. Force employers into strict quota systems to avoid potentially enormous liability resulting from *de minimus* differences in selection rates; and

c. Discourage recruitment efforts of protected groups at the entry level to avoid the predictable negative effect upon promotion rates of these same protected groups and the resultant liability.

The Ninth circuit decision herein is in conflict with decisions of this Court, as well as its own precedent in the following ways:

Standing

Based upon the undisputed facts respondent was not harmed by the only examination she participated in. She passed every part, had the highest possible score on the only part in which the Sheriff's Department had

direct control of, the appraisal of promotability, and would have been appointed from the eligible list but for the appeals of other candidates, which is not a function of the examination. Respondent could have pursued her own appeal of the oral part of the examination to the Civil Service Commission, as did others whose scores were raised, but chose not to for her own reasons. She also alleged that there was a failure to promote when she was at the top of the list before it expired, but that failure to promote is, again, not a function of the examination.

Before there can be standing to sue, there must be a "live" case or controversy in the outcome of which the plaintiff has a legally cognizable interest. (U.S. Constitution, Article III.) The only claim which the respondent has standing to raise is that of her non-appointment from the 1975 sergeant eligible list. In *Preston v. Heckler*, 734 F.2d 1359, 1363-64, (9th Cir. 1984), the Ninth Circuit held that the essential element of the standing doctrine under the Article III "actual case or controversy" requirement to confer federal jurisdiction is that "plaintiff . . . show that he personally has suffered from some actual or threatened injury as a result of the putatively illegal conduct of the defendant."[citations omitted] (*See*, also, *Western Mining Council, et al. v. Watt*, 643 F.2nd 618 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031 (1981).)

Whatever harm respondent had suffered from the examination itself was fixed as of the date of promulgation of the eligible list. The Ninth Circuit affirmed that date to have been May 3, 1975. The fact that the list did not expire until May 21, 1977 is irrelevant to determine when any harm from the examination itself began to accrue.

Two cases on point from this Court and one from the Third Circuit support petitioners' position. They are, respectively, *Delaware State College, et al. v. Ricks*, 449 U.S. 250 (1980), wherein this court held that the decision to deny tenure was the operative act which began the statute of limitations period, not the date when Ricks' termination occurred; *Lorance v. A.T. & T. Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261 (1989), where the operative act was the date the seniority calculation method was changed, not the date when Lorance was demoted under the new method, despite the argument that it could not be known when, if ever, Lorance would be harmed until the demotion occurred; *Bronze Shields, Inc. v. New Jersey Dept. of Civil Service*, 667 F.2d 1074 (3d Cir. 1981), where the Third Circuit applied the reasoning in Ricks to reject an argument by plaintiffs that an eligibility roster from an allegedly discriminatory examination constituted a continuing violation as long as the roster remained in effect.

The Ninth Circuit's determination that respondent had standing to challenge the 1977 sergeant examination despite the fact that she failed to apply for it is contrary to the standard enunciated in *Teamsters v. U.S.*, 321 U.S. 324, 364 (1977) and is clearly erroneous. The only evidence respondent adduced was a hearsay statement attributed to a third party, not even the person with whom respondent was conversing, and was directly contradicted by her own prior statement that she had been informed that she would be promoted from the 1975 sergeant examination eligibility list.

The Ninth Circuit's affirmance of the District Court's granting of class certification is contrary to this Court's holding in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) and, subsequently, in *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 876,

880, 887 (1984). Adherence to the "across the board" rationale caused this court to reverse the Ninth Circuit previously, as noted in *Jordan v. County of Los Angeles*, 713 F.2d 503 (9th Cir. 1983).

Adverse Impact

Despite the Ninth Circuit's attempts to distinguish it, *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1271 (9th Cir. 1981), requires a determination that no *prima facie* case of adverse impact has been established for failure to demonstrate a reliable and "significantly discriminatory pattern." *Connecticut v. Teal*, 457 U.S. 440, 448, 102 S.Ct. 2525, 2531 (1982) similarly requires "significant adverse effect."

Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 109 S.Ct. 2115 (1989) is especially apt in its requirement that statistics must be rigorously based upon appropriate comparisons, not between, e.g., apples and oranges, which may both be fruit but very different kinds of fruit. Similarly, men and women deputies with different experiences cannot be appropriately compared, not because of their gender difference but because of their experience difference (i.e., "rookies" v. "veterans").

In reaching its conclusion of the existence of adverse impact, the Ninth Circuit applied the wrong standard on review. *Clady v. County of Los Angeles*, 770 F.2d 1421, 1427 (9th Cir. 1985), specifically holds that *de novo* review of whether respondent has established a *prima facie* case is appropriate, not the clearly erroneous or even substantial evidence standard. Similarly, the Ninth Circuit's rationale that the order of proof melds into an inquiry of justification once a *prima facie* case has been deemed established, even erroneously, has been rejected by this court in *Wards Cove*, which specifically

reviewed the *prima facie* case after a trial on the merits and found it deficient.

Retaliation

The Ninth Circuit ignored the fact that discrimination and retaliation are distinct and independent claims under Title VII and its own precedent in *Ruggles v. California Polytechnic State University*, 797 F.2d 782, 785 (9th Cir. 1986), which establishes retaliation as a distinct claim from discrimination as a matter of law so that it cannot fit within the reasonably related analysis.

Accordingly, this court should issue a writ of *certiorari* to review and reverse the decisions of the Ninth Circuit because they conflict with decisions of this Court and its own precedent and because of the importance of the questions presented.

Dated: October 21, 1991

Respectfully submitted,

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APPENDICES

Susan L. BOUMAN, on behalf of herself and all others similary situated, Plaintiff-Appellee,

v.

Sherman BLOCK,* Sheriff of Los Angeles County; County of Los Angeles; Los Angeles County Sheriff's Department; Herbert Kaplan, Director of Personnel for Los Angeles County; Los Angeles County Department of Personnel; Los Angeles County Civil Service Commission; Frank A. Work, John C. Bollens, Louise L. Frankel, James E. Kenney, George S. Nojima, in their Capacity as Members of the Los Angeles County Civil Service Commission; Marie Quinney; John P. Knox; Association for Los Angeles Deputy Sheriffs, Defendants-Appellants.

Susan L. BOUMAN, on behalf of herself and all others similarly situated, Plaintiff-Appellant,

v.

Sherman BLOCK, Sheriff of Los Angeles County; County of Los Angeles; Los Angeles County Sheriff's Department; Herbert Kaplan, Director of Personnel for Los Angeles County; Los Angeles County Department of Personnel; Los Angeles County Civil Service Commission; Frank A. Work, John C. Bollens, Louise L. Frankel, James E. Kenney, George S. Nojima, in their Capacity as Members of the Los Angeles County Civil Service Commission; Marie Quinney; John P. Knox; Association for Los Angeles Deputy Sheriffs, Defendants-Appellees.

Nos. 88-6009, 88-6010, 88-6458; , 89-55448, 89-55784 and 88-55130.

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*Sherman Block, Sheriff of Los Angeles County, was substituted for Peter Pitchess, the former Los Angeles County Sheriff, as the real party in interest pursuant to F.R.A.P. 43(c)(1).

APPENDIX A

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 8, 1990.

Decided July 23, 1991.

Female deputy brought suit charging sex discrimination. The United States District Court for the Central District of California, Robert M. Takasugi, J., found that county had discriminated against plaintiff and class members and ordered that county develop valid sergeant examinations, and pay plaintiffs' attorney fees and costs. Defendants appealed. The Court of Appeals, D.W. Nelson, Circuit Judge, held that; (1) Title VII claim was not time barred; (2) challenge to 1975 examination was not time barred; (3) plaintiff had standing to challenge 1977 sergeant examination; (4) county engaged in intentional sex discrimination by failing to promote female deputy to sergeant, even though vacancies were available; (5) sergeant examination had disparate impact on women; (6) claims under California Fair Employment and Housing Act (FEHA) were not time barred; (7) failure of district court to identify officials with policymaking authority required remand; (8) class certification was proper; (9) findings of discrimination supported injunctive relief; (10) remand was required for articulation of reasons for imposing punitive damages on chief of administrative division of county sheriff's department; (11) punitive damage award of twice back-pay award was reasonable; (12) remand was required for elaboration of reasons why class was denied back pay; (13) remand was required to determine whether plaintiff was entitled to 2.0 multiplier; (14) remand was required for determination whether there was good cause for plaintiff's untimely filing for costs; and (15) award of expert witness fees as costs was proper.

Affirmed in part, and remanded in part.

1. Civil Rights ⇐381

Although statute of limitations barred cause of action based on certain evidence, that evidence could provide relevant background information in determining employment discrimination action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

2. Federal Courts ⇐776

Legal questions relating to Title VII or similar sex discrimination claim are reviewed de novo. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

3. Civil Rights ⇐342

Sex discrimination charge was effectively filed with California Division of Fair Employment Practices (DFEP) on date Equal Employment Opportunity Commission (EEOC) forwarded charge to DFEP along with letter indicating they would defer to California agency. Civil Rights Act of 1964, § 706(d), as amended, 42 U.S.C.A. § 2000e-5(e)

4. Civil Rights ⇐342

Even if Equal Employment Opportunity Commission (EEOC) refers complaint to state agency orally, that communication will suffice to institute state proceedings. Civil Rights Act of 1964, §§ 701 et seq., 706(d), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-5(e).

5. Civil Rights ⇐342

State proceedings need not be commenced within 180 days after last discriminatory act in order to trigger Title VII's 300-day extended period for filing with Equal

Employment Opportunity Commission (EEOC). Civil Rights Act of 1964, § 706(d), as amended, 42 U.S.C.A. § 2000e-5(e).

6. Civil Rights ⇐373

California's one-year deadline for Division of Fair Employment Practices (DFEP) to issue accusation is not a jurisdictional prerequisite which divests courts of jurisdiction to hear claim, but rather may be subject to doctrine of equitable tolling. West's Ann.Cal.Labor Code § 1422.2 (Repealed).

7. Civil Rights ⇐373

Failure of California Division of Fair Employment Practices (DFEP) to issue accusation within one year of effective date of filing did not defeat employee's right to pursue federal claim; delay resulted from confusion over actual filing date of state claim and did not result in defendants being confronted with stale claim, nor did it deprive defendants of opportunity to preserve appropriate evidence. West's Ann.Cal.Labor Code § 1422.2 (Repealed).

8. Federal Courts ⇐858

Findings of fact in Title VII discrimination claim may be overturned on appeal only if they are clearly erroneous. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

9. Civil Rights ⇐373

Deputy's Title VII claim challenging sergeant examination accrued when resulting eligible list expired, rather than when examination was administered or eligibility list issued. Civil Rights Act of 1964, § 706(d), as amended, 42 U.S.C.A. § 2000e-5(e).

10. Civil Rights ⇐362

Deputy's failure to apply for sergeant examination did not deprive her of standing to challenge examination under Title VII, where it would have been futile for her to take the examination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

11. Federal Courts ⇐823

Evidentiary rulings are reviewed for abuse of discretion and will not be reversed absent some prejudice.

12. Evidence ⇐268

Testimony that deputy was told she would not be promoted was properly admitted to show deputy's state of mind in deciding whether to take sergeant examination.

13. Civil Rights ⇐390

Once Title VII case proceeds to judgment, issue is no longer whether plaintiff has established prima facie case, but whether there was discrimination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

14. Civil Rights ⇐383

To establish prima facie case of employment discrimination, plaintiff must show that she belongs to protected group; application was made for job for which employer was seeking applicants; despite plaintiff's qualifications for that job, she was rejected; and after plaintiff was rejected, position remained open and employer continued to seek applicants from persons of plaintiff's qualifications. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

15. Civil Rights ⇐378

Once plaintiff has established prima facie case of employment discrimination, employer must show legitimate, nondiscriminatory reasons for challenged employment action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

16. Civil Rights ⇐378

If employer shows legitimate, nondiscriminatory reason or challenged employment action, plaintiff must then persuade court that discriminatory reason more likely motivated employer, or that employer's proffered explanation is unworthy of credence. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

17. Civil Rights ⇐383

When defendant fails to persuade district court to dismiss action for lack of prima facie case and responds to plaintiff by offering evidence of reason for plaintiff's protection, fact finder must then decide whether rejection was discriminatory within meaning of Title VII; whether prima facie case was made is no longer relevant. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

18. Civil Rights ⇐159

County engaged in intentional sex discrimination by failing to promote female deputy to sergeant, even though vacancies were available. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

19. Civil Rights ⇐383

Statistical evidence need not be uncontroverted to establish prima facie case of disparate impact in Title VII action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

20. Civil Rights ⇐383

Statistical disparity should be "substantial" or "significant" to establish prima facie case of disparate impact in Title VII action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

21. Civil Rights ⇐159

Police sergeant examination had disparate impact on women, women's pass rate was only 66 percent of men's pass rate, while women's promotion rate was less than 53 percent of men's promotion rate. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

22. Civil Rights ⇐159

Police sergeant examination had disparate impact on women, women's pass rate was only 67 percent of men's pass rate, while women's promotion rate was only 66 percent of men's promotion rate. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

23. Civil Rights ⇐159

Later sergeant examination was not to be included in determining whether there was a statistically significant violation of 80 percent rule in two earlier examinations; inclusion of later data would not have improved reliability of the data, but would have

improperly obscured discriminatory effects of earlier examinations. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

24. Civil Rights ⇐210

Female deputy's claim that sergeant examinations had disparate impact on women was not barred by laches, despite county's claim that deputy's delay in bringing her claim resulted in loss or destruction of validating documentation that would have shown that examination was not discriminatory. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

25. Civil Rights ⇐379

Once female deputy proved prima facie case that sergeant examination had disparate impact on women, county was obligated to validate examination by showing that it was a realistic measure of job performance; showing that disparity in performance between men and women was attributable to fact that women had fewer years of experience and were more likely to be first-time test-takers did not excuse county from its obligation to validate. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

26. Sheriffs and Constables ⇐17

Deputy's charge of retaliation in response to filing complaint with Equal Employment Opportunity Commission (EEOC) was not barred by deputy's failure to file EEOC charge about such retaliation, where retaliation claim was reasonably related to prior sex discrimination claim. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

26. Sheriffs and Constables ⇐17

County's denial of transfer to deputy was sufficiently adverse employment decision to establish retaliation for filing charge with Equal Employment Opportunity Commission (EEOC); county's contention that deputy was not transferred because of her "attitude, immaturity and failure to understand her role as a deputy sheriff" was pretextual. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

28. Courts ⇐489(2)

California superior courts' jurisdiction over claims brought under California Fair Employment and Housing Act (FEHA) is not exclusive. West's Ann.Cal.Gov.Code §§ 12900 et seq., 12980.

29. Federal Courts ⇐15

Federal courts may exercise pendent jurisdiction over state law claims arising from nucleus of facts common to both state and federal claims. West's Ann.Cal.Gov.Code §§ 12900 et seq., 12980.

30. Federal Courts ⇐15

Claim under California Fair Employment and Housing Act (FEHA) was related to federal Title VII and could be adjudicated in federal court under doctrine of pendent jurisdiction. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

31. Civil Rights ⇐448

Deputy had one year after receiving right-to-sue letter to file claim under California Fair Employment and Housing Act (FEHA). West's Ann.Cal.Gov.Code § 12981.

32. Federal Courts ⇐922

Failure of district court in sex discrimination action brought by female deputy to identify officials with policymaking authority required remand for determination under state and county law of who had authority to make employment policy and for finding of fact as to whether county board of supervisors delegated that authority to sheriff's department.

33. Civil Rights ⇐206(2)

If authorized policymakers retain authority to measure official's conduct for conformance with other policies, or if they approve subordinate's decision and basis for it, their ratification would be chargeable to municipality, for purposes of § 1983, because their decision is final. 42 U.S.C.A. § 1983.

34. Civil Rights ⇐206(3)

If practice is so permanent and well-settled as to constitute custom or usage with force of law, plaintiff may proceed in § 1983 action, despite absence of written authorization or express municipal policy. 42 U.S.C.A. § 1983.

35. Federal Civil Procedure ⇐184.15

District court properly certified female deputy's sex discrimination suit as class action; court identified common legal issue, discrimination against women, and common factual problem, discrimination as applied in sheriff's department, and analyzed whether required elements were present to certify class action. Fed.Rules Civ.Proc. Rule 23(a), 28 U.S.C.A.

36. Federal Courts ⇐862

So long as district court's decision to issue injunctive relief is not based on incorrect interpretation of law, it is reviewed for abuse of discretion.

37. Civil Rights ⇐391, 392

District courts have broad equitable powers to fashion relief for violations of Title VII that will eliminate effects of past discrimination; court may order injunctive relief where there are not sufficient assurances that employer is likely to repeat its discriminatory actions. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

38. Civil Rights ⇐392

Subsequent sergeant examination in which performance of women improved did not moot sex discrimination claims arising out of prior examinations, absent showing that later examination was a valid, job-related test or showing that violation would not recur. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

39. Civil Rights ⇐392

Injunctive relief ordering county to develop "validated" sergeant examination and to hire female sergeants consistent with their percentage representation as deputies until defendants instituted validated selection procedures was justified by finding of discrimination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

40. Civil Rights ⇐111

Perjurious testimony cannot form basis of cause of action under § 1983. 42 U.S.C.A. § 1983.

41. Federal Courts ⇐922

Where district court did not state its reasons for punitive damage award against chief of administrative division of county sheriff's department, remand was required for articulation of reasons for award and discussion of why chief's actions were "evil" or exhibited "reckless indifference" to female deputy's civil rights such as to justify award under § 1983. 42 U.S.C.A. § 1983; West's Ann.Cal.Civ.Code § 3294.

42. Federal Courts ⇐791

Reviewing court must uphold award of damages whenever possible and all presumptions are in favor of judgment.

43. Damages ⇐94

While California law requires that punitive damages bear reasonable relationship to compensatory damages, there is no fixed ratio or formula for determining proper proportion between the two.

44. Damages ⇐94

Amount of compensatory damages is relevant yardstick by which to measure appropriateness of punitive damage award under California law.

45. Civil Rights ⇐275(1)

Punitive damage award amounting to double the back pay award in sex discrimination action was not excessive. 42 U.S.C.A. § 1983.

46. Civil Rights ⇐275(1)

Retirement of chief of administrative division of county sheriff's department did not preclude award of

punitive damages against him in sex discrimination action; despite contention that chief's retirement vitiated deterrent function of punitive award, award would send message to others in sheriff's department that they could be liable individually for their actions in violation of a person's rights. 42 U.S.C.A. § 1983.

47. Civil Rights ⇐401

Where discrimination is found, back pay should be denied only for reasons which would not frustrate purpose of eradicating discrimination; district court which declines to award back pay must carefully articulate its reasons for doing so.

48. Federal Courts ⇐878

District court's determination of amount of attorney fees is reviewed for abuse of discretion; this standard applies to basic fee computation and to multiplier.

49. Federal Civil Procedure ⇐2737.4

Attorney fees may be awarded by calculating lodestar amount, number of hours reasonably expended on litigation, multiplied by reasonable hourly rate.

50. Civil Rights ⇐419

In calculating lodestar amount, district court committed no clear error in calculating hourly base, and rate used was supported by declarations that the rate was the prevailing market rate in relevant community.

51. Federal Civil Procedure ⇐2737.4

District couurt did not abuse its discretion in using current hourly rates to compensate for delay in receiving payment; this adjustment also took into account lost interest and inflation.

52. Civil Rights ⇐418

Use of at least one and one-third multiplier to enhance lodestar amount in sex discrimination action to account for risk of nonpayment was supported by evidence that plaintiff contacted at least 16 lawyers, all of whom declined to hear her case because there was little or no prospect of earning a fee; however, remand was required for court to consider evidence of market conditions and determine whether plaintiff was entitled to 2.0 multiplier she had requested or some other multiplier in excess of one and one-third figure. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

53. Federal Civil Procedure ⇐2737.4

Award of attorney fees for hours expended by attorneys hired by plaintiff's primary lawyer was proper; court reduced number of hours expended by attorneys to extent they acted as experts or consultants.

54. Federal Courts ⇐922

Remand was required for determination whether there was good cause for plaintiff's untimely filing for costs. F.R.A.P.Rule 26(b), 28 U.S.C.A.

55. Civil Rights ⇐455

When plaintiff proceeds under multiple theories and prevails on her claims under California Fair Employment and Housing Act (FEHA), she is entitled to attorney fees under FEPA. West's Ann.Cal.Gov.Code § 12965(b).

56. Civil Rights ⇐409, 455

Expert witness fees could not be awarded as costs to Title VII plaintiff under § 1988, but could be supported under California Fair Employment and Housing Act

(FEHA). West's Ann.Cal.Gov.Code § 12965(b); 42 U.S.C.A. § 1988.

Alan N. Terakawa, Deputy County Counsel, Los Angeles, Cal., for defendants-appellants-cross appellees.

Dennis M. Harley, Pasadena, Cal., for plaintiff-appellee-cross appellant.

Appeal from the United States District Court for the Central District of California; Robert M. Takasugi, District Judge, Presiding.

Before D.W. NELSON and REINHARDT, Circuit Judges and SINGLETON**, District Judge.

D.W. NELSON, Circuit Judge:

Plaintiff-appellee Susan Bouman filed a suit in federal court on April 7, 1980, alleging that defendants-appellants Sherman Block, the Los Angeles County Sheriff who was substituted as the real party in interest for Peter Pitchess, the former Sheriff; The County of Los Angeles; the Sheriff's Department; John Knox, Chief of the Administrative Division of the Los Angeles County Sheriff's Department; the Association for Los Angeles Deputy Sheriffs and several other named defendants (herein collectively referred to as "the County") engaged in sex discrimination against her. Bouman filed her claim on behalf of herself and a class of potential female applicants for the position of sergeant. She alleged violations of 42 U.S.C. § 1982, Cal.Gov. Code § 12900 *et seq.* and Title VII.

**The Honorable James R. Singleton, United States District Court Judge for the District of Alaska, sitting by designation.

The trial court found that the County had discriminated against Bouman and the class members and ordered that the county develop valid sergeant examinations, as well as pay plaintiffs' attorney's fees and costs. Defendants-appellants appeal from that judgment.

To determine whether the County of Los Angeles may be sued in this case, we remand to the district court for findings of fact and conclusions of law on who possesses the authority to make employment policy decisions for the Sheriff's Department. We also remand for a statement of reasons why the class was denied back pay, for an articulation of the reasons justifying the imposition of punitive damages against Knox, for a determination of whether plaintiff is entitled to a multiplier of attorney's fees over the one and one-third multiplier awarded, and for a determination of whether there was good cause for plaintiff's untimely filing for costs. If the court determines the bill of costs was timely the district court's decision to award costs is affirmed. The district court's findings and holding on all other issues raised in this appeal are affirmed.

Facts

Susan L. Bouman was hired by the County of Los Angeles as a Deputy Sheriff in 1971. In 1974 she applied for a promotion to sergeant and took a three-part examination in 1975 to qualify for promotion.

From the examination score an eligibility list was developed and used for two years. At the time the list expired on May 21, 1977, Bouman was at the top of the list and would have received the next appointment. From the list, four females and 127 males were promoted. Bouman was not promoted from this list.

Prior to the list's expiration, plaintiff inquired of her chances for appointment. Bouman testified that her superior, Lieutenant Geiger, "basically told her not to hold her breath." Others in the department also knew that Bouman was not likely to be promoted. One deputy from another station who was behind Bouman on the eligibility list called her because he heard that she was not going to be promoted and was concerned about how this would affect his promotion chances.

Bouman presented evidence at trial based on an internal investigation in the Sheriff's Department that there were vacancies to which she could have been promoted. She alleges that the County hid the fact that there were vacancies and suppressed a January 25, 1978 report by Lt. Maher which discussed those job openings.

Another sergeant examination was administered in 1977, but Bouman did not take it because she believed it would be futile and that the testing procedures discriminated against women. However, Bouman took the 1980 sheriff's examination and after filing the instant action was promoted on July 26, 1981.

On January 3, 1978, 217 days after the 1975 promotion list expired, Bouman mailed a complaint to the California Fair Employment Practices Commission alleging sex discrimination by the Sheriff's Department in its promotion practices. On January 17, 1978, the California agency issued an accusation letter charging the County with discrimination. That letter was withdrawn six months later and defendant was given a right-to-sue letter. Bouman filed a complaint in federal court on April 7, 1980, charging violations of Title VII, 42 U.S.C. § 1982 and Cal.Gov.Code § 12900. She named several defendants including the Los Angeles County Sheriff, the County itself, the Sheriff's Department and

several other individuals who worked for the County or the Sheriff's Department or were members of the Civil Service Commission.

Plaintiff sued on behalf of herself and a class of similarly situated persons. That class was certified as:

> a) all females who have been, are or will be applicants for promotion to or employees in, sworn, uniformed positions in the Los Angeles County Sheriff's Department;
>
> b) all females who would have been or would be in the future applicants for promotion to, or employees in, sworn, uniformed positions in the Los Angeles County Sheriff's Department but for defendant's allegedly illegal promotion practices.
>
> c) all females who have been, are, or will be applicants for transfer to any and all sworn, uniformed job classifications maintained by the Los Angeles County Sheriff's Department;
>
> d) all females who would have been or would be in the future applicants for transfer to any and all sworn, uniformed job classifications maintained by the Los Angeles County Sheriff's Department.

Bouman brought several claims on behalf of herself and the class. For the class, she alleges that the sergeant examinations discriminated against women. She argued that the design of the 1975 examination was flawed. Bouman submitted statistical evidence showing that the examination had a disparate impact on women. The County admits that women deputies suffered an adverse impact on the written portion of the 1975 examination, but contends that any differences in performance are not statistically significant and are explained by nondiscriminatory factors such as job experience.

Bouman also contends that defendants-appellants engaged in intentional discrimination against her and retaliated against her for filing a claim with the EEOC.

[1] Plaintiff contends that job experiences in the Sheriff's Department were not gained in a neutral fashion, citing the discriminatory assignments she endured. Bouman was not permitted to serve in a solo radio car at night in certain areas because her supervisors felt it would be inappropriate. Meanwhile, male deputies were allowed to serve in such areas. The station commander also had a policy of having women deputies rotate on the station complaint desk. At one point she was told to leave a radio car and work the station front desk. Men were not required to rotate on the front desk. The statute of limitations bars a cause of action based on this evidence, but the evidence may provide relevant background information in determining present discriminatory action. *United Air Lines v. Evans,* 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977).

The district court found that the County engaged in retaliatory discrimination against Bouman for filing her complaint with the EEOC. The court also found that the County used discriminatory examinations which had a disparate impact on women, and engaged in intentional discrimination against Bouman by failing to promote her to sergeant, though sergeant positons were available.

DISCUSSION

I. Timely Filing of EEOC Claim

[2] Appellants (collectively referred to as "the County") argue that Bouman's complaint with the EEOC was time-barred because she did not comply with the statutory requirements for filing. Legal questions relating to a Title VII or similar sex discrimination claim are reviewed de

novo. *U.S. v. McConney,* 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). A district court's underlying findings of fact are subject to a clearly erroneous standard of review. Fed.R.Civ.P. 52(a); *Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

In order to file a claim with the EEOC under Title VII, complainants must first satisfy two jurisdictional prerequisites. They must file the complaint with the EEOC within 180 days after the last discriminatory act. 42 U.S.C. § 2000e-5(e). However, if the aggrieved person has instituted proceedings with a state or local agency with authority to grant or seek relief from such practices, complainants are allowed 300 days to file with the EEOC. *Id.*

On January 3, 1978, Bouman mailed a complaint to the California Division of Fair Employment Practices (DFEP) [now the Department of Fair Employment and Housing]. She received a return receipt from that office on January 4, 1978, but for some reason, the DFEP shows no record of receiving it. Bouman refiled her complaint with the DFEP on January 17, 1978.

At the same time she mailed the complaint to the DFEP, Bouman also mailed a complaint to the EEOC. On January 10, 1978, the EEOC forwarded the charge to the DFEP along with a letter indicating they would defer to the California agency.

[3] Bouman contends that her charge with the DFEP was effectively filed on January 10, 1978, when the EEOC forwarded the charge. The County contends that her complaint was not filed until January 17, 1978, the date the DFEP docketed as the filing date. This factual issue

determines when the statute of limitations tolls and whether Bouman's claim is time-barred.

The district court noted that under *Saulsbury v. Wismer & Becker, Inc.*, 644 F.2d 1251, 1255-56 (9th Cir.1981), state proceedings can be considered initiated on the date the charge is received by the EEOC, if the EEOC promptly defers to the state agency. The Supreme Court determined in *Mohasco Corp. v. Silver*, 447 U.S. 807, 816, 100 S.Ct. 2486, 2492, 65 L.Ed.2d 532 (1980), that the EEOC institutes states proceedings when it forwards the complainant's letter to the state agency. The district court found that the EEOC sent the letter and the charge on January 10th and accepted that as the DFEP filing date. The district court applied the correct legal standard and its findings of fact on this issue are not clearly erroneous.

[4] Appellants claim that there is no evidence that the charge was received along with the deferral letter. However, we held in *Saulsbury* that no particular formal "charge" is required to institute proceedings. 644 F.2d at 1255. Even if the EEOC refers a complaint to a state agency orally, that communication will suffice to institute state proceedings. *Love v. Pullman*, 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972). It is not necessary to show that the charge itself was forwarded on January 10 along with the EEOC's deferral letter.

The rule of *Mohasco Corp. v. Silver*, 447 U.S. 307, 100 S.Ct. 2486, requiring that a state agency be given sixty days in which to consider the charges before the charges may be filed with the EEOC, does not apply to this case. We decided in *Wiltshire v. Standard Oil Co. of California*, 652 F.2d 837, 842 (9th Cir.1981), *cert. denied*, 455 U.S. 1034, 102 S.Ct. 1737, 72 L.Ed.2d 153 (1982), that *Mohasco* would not apply retroactively to

any charge filed before June 23, 1980. Bouman filed the complaint in this action on April 7, 1980, so the sixty-day *Mohasco* rule is inapplicable.

Bouman effectively filed her complaint with the EEOC on January 10, 1978, 224 days after the discriminatory act, a date well within the 300-day limit specified by law. Even if the *Mohasco* rule were applied, Bouman would have filed her complaint 284 days after the discriminatory act, a date still within the 300-day limit.

The County contends that the 300-day extension is triggered only where plaintiffs "*initially* instituted proceedings with the state or local agencies." 42 U.S.C. § 2000e-5(e) (emphasis added). Because she filed first with the EEOC and not with the state, they argue that the 300-day extension is unavailable to Bouman.

[5] In *Wiltshire,* we rejected the argument that state proceedings must be commenced within 180 days to trigger the 300-day extended filing period. 652 F.2d at 839. We noted that "the deferral state exception requires only that state proceedings be instituted before the expiration of the 300-day extended filing period." *Id.* Since the EEOC deferred jurisdiction to the state within 300 days, the extension period is triggered regardless of whether the complaint was first received by the EEOC or the state. The district court did not err in concluding that Bouman's EEOC complaint was timely filed and that her Title VII claim was not time-barred.

The County also argues that Bouman's state law claims are barred because the DFEP did not issue an accusation within the one-year period required by California Labor Code § 1422.2. The agency promulgated an accusation on January 17, 1979, seven days later than California law requires. The County contends that this bars Bouman's claims under the California Fair Employment

Practices Act ("FEPA"), even those raised under the pendent jurisdiction of the court.

[6] We have recognized that state time limits on filing court actions or other similar filing deadlines should generally be treated as statutes of limititations subject to the doctrine of equitable tolling, rather than jurisdictional prerequisites which divest the court of jurisdiction to hear the case if they are not met. *Salgado v. Atlantic Richfield Co.,* 823 F.2d 1322, 1324 (9th Cir.1987). We hold that the one year deadline for the state to issue an accusation is not a jurisdictional prerequisite which divests the courts of jurisdiction to hear the claim. We now determine whether to apply the equitable tolling doctrine.

[7] The California legislature has directed that the FEPA be construed liberally so as to accomplish its purpose. Cal.Gov.Code § 12993; *Goldmore v. Wilsey Foods Inc.,* 216 Cal.App.3d 1085, 266 Cal.Rptr. 294 (2 Dist. 1989). Throughout these proceedings, Bouman has demonstrated diligence in pursuing her claims. *Salgado,* 823 F.2d 1322, 1324. She had to await the issuance of a right-to-sue letter in order to file a civil claim. *Id.* The seven-day delay no doubt resulted from the confusion over the actual filing date of her state claim and did not result in appellants being confronted with a stale claim. Nor did it deprive appellants of an opportunity to preserve appropriate evidence. *Id.* Under these circumstances, we think that allowing Bouman to proceed despite the late issuance of the accusation is consistent with the specific purposes of the time period imposed by the California legislature. *See id.*

Furthermore, the late accusation has no impact on her federal claims. *E.E.O.C. v. Commercial Office Products Co.,* 486 U.S. 107, 122-125, 108 S.Ct. 1666,

1674-1676, 100 L.Ed.2d 96 (1988), prohibits the use of state law limitations periods for filing discrimination actions to defeat Title VII causes of action. The fact that the state failed to issue an accusation within one year of the effective date of filing should not defeat her right to pursue a federal claim. *See id.* This is especially true since any delay occurred through no fault of Bouman's.

II. Standing

A. *Standing to Challenge the 1975 Sergeant Examination*

The County contends that plaintiff's claim challenging the 1975 examination as discriminatory is time-barred. The critical question is whether the Sheriff's Department, within 300 days prior to the date Bouman filed her charge, (January 10, 1978), engaged in the unlawful conduct of failing to promote women in situations where men would be promoted. *Scott v. Pacific Maritime Assoc.*, 695 F.2d 1199, 1204 (9th Cir.1983).

[8] Findings of fact in a Title VII discrimination claim may be overturned on appeal only if they are clearly erroneous. *Anderson v. City of Bessemer,* 470 U.S. 564, 565, 573, 105 S.Ct. 1504, 1507, 1511, 84 L.Ed.2d 518 (1985). Legal questions are reviewed de novo. *U.S. v. McConney,* 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

The County contends that the time bar dates from the administration of the 1975 examination and the promulgation of the eligible list on May 3, 1975. Bouman contends that May 21, 1977, the date the eligibility list expired, is the appropriate date from which to mark time for statute of limitations purposes because she could

have been promoted from the list until that date. The district court agreed with Bouman's thory and found that appellants discriminated against her by failing to promote her by the time the 1975 list expired.

In *Delaware St. College v. Ricks,* 449 U.S. 250, 256-258, 101 S.Ct. 498, 503-504, 66 L.Ed.2d 431 (1980), the complaint of a professor who was denied tenure and then given a one-year contract, after which he was terminated, was held to be time-barred. The Court found that the tenure decision, not the one-year contract expiration, was the "unlawful employment practice" at the base of his claim. Similarly, in *Bronze Shields Inc. v. New Jersey Dept. Civ. Serv.,* 667 F.2d 1074, 1080 (3rd Cir. 1981), *cert. denied,* 458 U.S. 1122, 102 S.Ct. 3510, 73 L.Ed.2d 1384 (1982), plaintiffs took and failed an examination used to determine promotion eligibility. The court distinguished between the decision (the examination) and its effects (the eligible list and its appointments therefrom). The Third Circuit held that the plaintiffs knew they would not be hired when the eligibility roster was issued. The court determined that the allegedly discriminatory employment practice occurred when the eligibility list was released, not when the list expired.

The Supreme Court affirmed this view in *Lorance v. AT & T,* 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989), when it held that limitations periods on a civil rights claim based on a discriminatory seniority system run from the date the system was adopted. As *Ricks* states, where "the only challenged employment practice occurs before the termination date, the limitations periods necessarily commence to run before that date." 449 U.S. at 259, 101 S.Ct. at 505. The crucial issue in this case is whether Bouman's non-appointment

from the eligible list was a separate injury from the allegedly discriminatory examination itself.

[9] The County analogizes Bouman's case to *Ricks,* contending that the examination's administration and the issuance of the eligibility lists are the relevant events, not the expiration of the list. Bouman's case is distinguishable from *Ricks* and *Bronze Shields* because in those cases plaintiffs termination or non-promotion was a delayed but inevitable result of being denied tenure or not scoring well enough on the exam. In Bouman's case, by contrast, not until the list expired was it certain that she would not be promoted. She did not know until that date that she had suffered an injury. The eligible list expired within 300 days of the date Bouman filed her EEOC and California state discrimination claims. Appellee satisfies the timeliness requirements under *Ricks, Lorance* and *Bronze Shields.*

B. *Standing to Challenge the 1977 Examination*

The County contests Bouman's standing to challenge the 1977 sergeant examination as discriminatory under Title VII. Bouman did not apply for that examination, and the county claims the class is deficient without a representative who took and failed any part of that examination and timely filed a claim.

Under *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 364-367, 97 S.Ct. 1843, 1869-1871, 52 L.Ed.2d 396 (1977), a person may have standing in a Title VII action to challenge discriminatory practices even if she did not apply for the position she claims was closed to her because of discrimination. A plaintiff is not barred from bringing such an action where "an application would have been a useless act serving

only to confirm a discriminatee's knowledge that the job he wanted was unavailable to him." *Id.* at 367, 97 S.Ct. 15 1870.

[10] The district court found that it would have been futile for Bouman to take the 1977 examination and concluded that she had standing to challenge the examination. Under Federal Rule of Civil Procedure 52(a): "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." *Anderson v. Bessemer City,* 470 U.S. at 573, 105 S.Ct. at 1511.

[11] The County makes two evidentiary objections to Bouman's testimony at trial that she did not take the 1977 examination because she was told she would not be promoted. The County objected at trial to this testimony as hearsay, inadmissible to prove the truth of the matter asserted. Evidentiary rulings are reviewed for an abuse of discretion and will not be reversed absent some prejudice. *Roberts v. College of the Desert,* 870 F.2d 1411, 1418 (9th Cir.1989).

[12] The County acknowledges that the contested statement might be admissible to show plaintiff's state of mind in deciding whether or not to take the examination. Since it can plausibly be admitted under this exception to the hearsay rule, the district court's decision to admit this testimony was not an abuse of discretion.

The County also contends that even if this statement is admissible, it is not credible because it is inconsistent with her prior written statement that after she failed to file for the 1977 exam, she did not pursue her appeal of her 1975 score because she was told she would be promoted. The County reads this statement to mean

that she did not take the 1977 examination because she believed she would be promoted based on her 1975 score. Bouman's statement, however, is confined to her reasons for not appealing her 1975 score. It does not touch upon why she failed to register for the 1977 exam and does not contradict her later statements about the futilty of the 1977 exam.

Even if we were to read the statements as contradictory, we would apply a deferential, clearly erroneous, standard to the district court's findings about the real reason a nonapplicant failed to apply for a position. *Polykoff v. Collins,* 816 F.2d 1326, 1331 (9th Cir.1987); *Hervey v. City of Little Rock,* 787 F.2d 1223 (8th Cir.1986). Where "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Bessemer City,* 470 U.S. at 574, 105 S.Ct. at 1511. The district court could have plausibly determined that her oral testimony was more credible than her written statement about her reasons for not applying for the 1977 examination. The district court did not commit clear error in crediting Bouman's testimony on this issue.

Alternately, the County contends that Bouman's subjective belief in the 1977 examination's futility is not enough under *Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). However, in *Teamsters,* the Supreme Court recognized that in only a few cases will there be objective evidence of discrimination such as the posting of a "Whites Only" sign on the hiring door. More often, potential applicants may discern subtle signs of discrimination. *See id.* at 365, 97 S.Ct. at 1870. The Court's reference to a discriminatee's "knowledge" that the job he wanted was unavailble to him supports the contention that a

subjective evaluation of the examination's futility is permissible. 431 U.S. at 367 97 S.Ct. 15 1871.

The county argues that the district court based its futility determination on the disparate impact of the 1977 examination. They point out that Bouman could not have known in advance that the examination would have a disparate impact on women. They argue that the court worked backwards from a finding of disparate impact to a finding of futility in taking the exam.

The record shows that the district court relied on Bouman's testimony about why she did not take the exam to determine whether she believed that taking it would be futile. This testimony itself is sufficient to establish her standing under *Teamsters* to challenge the 1977 sergeant's examination. The district court's findings about the examination's ultimate futility do not affect her standing to bring this claim.

III. Findings of Sexual Discrimination

A. *Overview*

Bouman brings three separate claims under Title VII. First, she claims that the County intentionally discriminated against her by failing to promote her to existing sergeant vacancies while she was on the eligible list. Second, she contends that the sergeant examinations, a facially neutral device, have a significant adverse impact on women. Third, she argues that the County retaliated against her for filing her EEOC claims. The district court found for Bouman on the first and third claim, for the class on the second claim, and awarded Bouman back pay for her intentional discrimination claim.

[13] The County argues that Bouman failed to establish a *prima facie* case of employment discrimination on any

of these theories. If the trial court had granted summary judgment against Bouman or the County's motion to dismiss, on appeal we would determine whether plaintiff had established a *prima facie* that would preclude pre-trial adjudication. However, this case was tried and decided after both sides presented evidence. Once a Title VII case proceeds to judgment the issue is no longer whether plaintiff has established a *prima facie* case, but whether there was discrimination. *See United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 713-714, 103 S.Ct. 1478, 1480-1481, 75 L.Ed.2d 403 (1983). Appellants ask us to decide whether the trial court's findings of fact are supported by substantial evidence. *See Anderson v. City of Bessemer City,* 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Those findings should be overturned only if there was clear error. *Id.*

B. *Sufficiency of the Evidence of Intentional Discrimination*

[14-16] The County challenges the sufficiency of the evidence supporting Bouman's claim of intentional employment discrimination. We evaluate the sufficiency of the evidence of employment discrimination for clear error. *Bessemer City,* 470 U.S. at 573, 105 S.Ct. at 1511.

To establish a *prima facie* case for employment discrimination, plaintiff must show that: 1) she belongs to a protected group; 2) application was made for the job for which the employer was seeking applicants; 3) despite plaintiff's qualifications for that job, she was rejected; and 4) after plaintiff was rejected, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The employer

must then show a legitimate, non-discriminatory reason for the challenged employment action, *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 at 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981). Plaintiff must then persuade that court that a discriminatory reason more likely motivated the employer, or that the employer's proffered explanation is unworthy of credence. *Id.*

[17] However, "when the defendant fails to persuade the district court to dismiss the action for lack of a *prima facie* case, and responds to the plaintiff by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII." *U.S. Postal Service v. Aikens,* 460 U.S. at 714-715, 103 S.Ct. at 1481-1482. Whether a *prima facie* case was made is no longer relevant. *Id.* at 715, 103 S.Ct. at 1482. "The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.'" *Id.* (quoting *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981)).

[18] The County contends that the district court erred in concluding that Bouman was treated differently than similarly situated male employees. They argue that the County demonstrated a legitimate, non-discriminatory reason for her non-appointment—the lack of a permanent, funded vacancy for a sergeant at the time Bouman was eligible for promotion. The County argues that the district court erred in finding intentional discrimination after considering all the evidence.

The County presented evidence that no vacancy existed at the time the list expired. In response to a Los Angeles County Civil Service Commission (CSC)

inquiry, Chief Knox prepared a report on May 20, 1977, based on the weekly vacancy reports. The May 20, 1977 report indicated that there existed 926.5 authorized sergeant positions for the Sheriff's Department while only 902 sergeants were actually in service. Knox testified that these figures did not account for officers who were on extended leaves of absence because of vacation or illness. Deputy Rollins, who was responsible for counting vacancies, testified at trial that as of May 19, 1977, the department had over-promoted by three sergeant positions.

In reaching its conclusions that vacancies existed, the district court relied on a January 1978 report by Lt. Maher concerning Bouman's charges of sex discrimination. Maher's report indicated that vacancies did exist at the time the list expired. *Bouman*, 42 EPD at 46,311. Captain Turner testified that this report was forwarded to Inspector White and Chief Knox. Lt. Maher testified that he met with Knox to discuss the report. Yet, Knox and White testified that they were not aware of any documents prepared by the Sheriff's Department after May 1977 indicating that there were vacancies.

The County attacks Maher's credibility as a witness by pointing out that he worked with Bouman in his private business and consulted with her about preparing for litigation. Determinations about a witness' credibility should be left to the district court and not overturned except for clear error. *Bessemer City,* 470 U.S. at 573, 105 S.Ct. at 1511. The district court could plausibly have concluded that Maher's testimony was more credible than the defense's. This is particularly true in light of the fact that Chief Knox's report, which the County relies upon to show the lack of vacancies, speaks of several sergeant vacancies. In considering the written

evidence and the credibility of the witnesses, the district court did not commit clear error in reaching its decision.

The district court also noted that Chief Knox could not point to any other records to indicate the true vacancy rate. *Bouman,* 42 EPD at 46,311. The district court held that a preponderance of the evidence proved that vacancies existed to which Bouman should have been promoted. The trial court also concluded that the attempts to suppress Maher's report supported the inference of sex discrimination. *Id.* The district judge concluded that she was the victim of intentional sex discrimination and awarded her back pay from May 21, 1977, the date the promotion list expired.

The evidence supports the trial court's ultimate conclusion that the County engaged in intentional sex discrimination by failing to promote her to sergeant, even though vacancies were available. The district court did not commit clear error in awarding her back pay on that basis.

C. *Disparate Impact Claim The 1975 and 1977 Sergeant Examinations*

The district court also found that appellants discriminated against Bouman and the class plaintiffs through the 1975 and 1977 examinations which had a disparate impact on women. The County argues that the findings of adverse impact were in error. We now consider whether the evidence is sufficient to support the district court's conclusion.

[19] The County argues preliminarily that plaintiff must show *uncontroverted* evidence to establish disparate impact. This argument is without foundation. *Contreras v. City of Los Angeles,* 656 F.2d 1267 (9th Cir.1981) held only that where the evidence is

uncontroverted, a *prima facie* case is established. 656 F.2d at 1275. It established no requirement that statistical evidence be uncontroverted to establish a *prima facie* case. Moreover, after trial we review whether the verdict was supported by substantial evidence, not whether the plaintiff established a *prima facie* case sufficient to withstand pre-trial judgment. *U.S. Postal Service v. Aikens,* 460 U.S. at 713-714, 103 S.Ct. at 1480-1482.

[20] The federal agency guidelines for the establishment of statistical proof require a showing that the protected group is selected at less than four-fifths or 80 percent of the rate achieved by the highest scoring group. 28 C.F.R. § 50.14 at § 4(d) (1977). This is the so-called "80 percent rule." We have criticized these guidelines, *see Clady v. County of Los Angeles,* 770 F.2d 1421 at 1428 (9th Cir.1985), noting that they were not promulgated as regulations and do not have the force of law. Rather than using the 80 percent rule as a touchstone, we look more generally to whether the statistical disparity is "substantial" or "significant" in a given case. *Id.* at 1428-1429, (citing *Contreras,* 656 F.2d 15 1274-1275). Nonetheless, while the guidelines are not necessarily dispositive, they are instructive.

The trier of fact must consider the statistics in light of all the evidence. *See Bessemer City,* 470 U.S. at 573-574, 105 S.Ct. at 1511-1512. Whether the statistics are undermined or rebutted in a specific case would normally be a question for the trier of fact. *Compare Bessemer City,* 470 U.S. at 573, 105 S.Ct. at 1511, *with Teamsters,* 531 U.S. at 339-340, 97 S.Ct. at 1856-1857.

[21] We now turn to the statistical evidence. Of the 79 women who took the 1975 written test, ten, or roughly 13 percent, scored high enough on a combination of written and appraisal scores to be considered candidates

for promotion. Four women, or roughly five percent of the women who took the examination, were ultimately promoted. Of the 1312 men who took the 1975 written test, 250, or approximately 19 percent, received sufficiently high combined scores to be eligible for promotion. 127 men, or approximately ten percent, were ultimately promoted. *See* Appendix A. These figures clearly show a violation of the 80 percent rule. The women's pass rate—the number of persons placed on the eligibility list over the number who took the test—was only 66 percent of the men's pass rate, while the women's promotion rate—the number of people promoted over the number who took the test—was less than 53 percent of the men's promotion rate.

[22] The results of the 1977 examination were similar. Of the 102 women who took the 1977 written test, 18, or roughly 18 percent, scored high enough on a combination of written and appraisal scores to be considered candidates for promotion. Five women, or roughly five percent of the women who took the examination, were ultimately promoted. Of the 1259 men who took the 1975 written test, 331, or approximately 26 percent, received sufficiently high combined scores to be eligible for promotion. 93 men, or approximately seven percent, were ultimately promoted. *See* Appendix B. These figures show a violation of the 80 percent rule for both the 1977 examination and the promotions based on it. The women's pass rate was only 67 percent of the men's pass rate, while the women's promotion rate was only 66 percent of the men's promotion rate.

It is therefore clear that whether one looks at pass rates or promotion rates for 1975 or 1977, women's success rate was considerably lower than 80 percent of men's success rate. It follows that this is also true if

the results of the 1975 and 1977 examinations are aggregated.

The County argues that the violation of the 80 percent rule is not sufficient to support a finding of disparate impact under *Clady* because, according to the County, the numbers involved are too small to yield statistically significant results. We agree as a general matter that a violation of the 80 percent rule is not always statistically significant. In this case, however, the plaintiffs have demonstrated that the differences in the performances of men and women are statistically significant. Plaintiff's experts showed by several generally accepted techniques that the adverse impact of the examinations and the bottomline adverse impact were statistically significant.[1]

The County contends that the district court should not have credited the disparate impact data because a small number of women passed the tests and were promoted. The County points to our statement in *Contreras* that the statistical significance of a disparate impact showing in that case was undermined by the fact that if only three members of the plaintiff group (Spanish-surnamed applicants) had passed the examination there would have been no violation of the 80 percent rule. 656 F.2d at 1273 & n. 4. The County correctly points out that if only one additional woman had been promoted as a result of the 1977 examination, there would have been no violation of the 80 percent rule for that year. The same would be true for 1975

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[1] For example, plaintiff's expert showed that the violations of the 80 percent rule were significant at the .05 level. This means that the disparate success rates of men and women "would be the result of chance only one time in twenty." *Contreras*, 656 F.2d at 1273 n.3.

if just three more women had been promoted as a result of that year's examination.[2]

In our view, the County misinterprets the significance of our statement in *Contreras*. In *Contreras*, not only was the number of people in the plaintiff's group who succeeded on the examination small, the number who took it was small as well. Only 17 Spanish-surnamed applicants took the examination in question in *Contreras, id.* at 1273, whereas in the present case 79 women took the 1975 examination and 102 women took the 1977 examination. Generally, it is the combination of small sample size and small success rate that calls into question the statistical significance of a violation of the 80 percent rule. Moreover, in *Contreras*, there was no showing of statistical significance at the .05 level. *Id.* Here, there was. *See supra,* n. 1. Such a showing indicates that—*taking into account the effect of the small numbers*—the disparity is statistically significant.

The County nonetheless criticizes the finding of statistical significance because it is based in part on combining the results of the 1975 and 1977 examinations to yield the significance data. Yet, the courts have repeatedly looked at trends from past examinations to see if the total pass rate showed evidence of discrimination. *See Ezell v. Mobile Housing Bd.*, 709 F.2d 1376, 1382 (11th Cir.1983); *Boston Chapter NAACP v. Beecher,* 504 F.2d 1017, 1021 (1st Cir.1974). Moreover, the County's own experts at trial aggregated the data

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[2]If one additional woman had been promoted as a result of the 1977 examination, the ratio of women's success rate to men's success rate would have been (6/102)/(93/1259), or 0.80. If three additional women had been promoted as a result of the 1975 examination, the ratio of women's success rate to men's success rate for that year would have been (7/79)/(127/1312), or 0.92.

from the two exams because, as one of them stated, it produces a "more powerful test" and increases the number of observable cases. Bouman's aggregation of the 1975 and 1977 examinations were therefore permissible.

The County also criticizes the disparate impact analysis appellee submitted to the trial court because women who were eligible to take the examination but did not actually take it were included in the pool for analysis. We need not decide whether such evidence should have been admitted, because even if the analysis is limited only to actual test takers, the aggregate promotion rates for 1975 and 1977 show a statistically significant violation of the 80 percent rule.

[23] Last the County argues that if data from multiple years are to be aggregated, the results of the 1980 examination—on which women's performance improved—should be included in the calculations. The County cites *Clady,* 770 F.2d at 1428, for the proposition that a flexible interpretation of the Uniform Guidelines means that a determination of adverse impact should not result from a single administration of an exam, but from an analysis over time. This reading of *Clady* is unsupported by its text. In *Clady* we stated that we will not rigidly adhere to the 80 percent rule, but will consider evidence of discrimination whenever it is "significant" or "substantial." *Id.* Evidence that the 80 percent rule was violated which is significant at the .05 level for the 1975 and 1977 examinations is substantial evidence that the court may take into account. *Clady* imposed no requirement that subsequent examinations also be considered.

Moreover, the 1980 examination was administered *after* Bouman brought suit. We have recognized the

"[l]ooking at the [employer's] record of performance after the courts have been asked to intervene is irrelevant to the merits of a discrimination claim and can be highly misleading." *Gonzalez v. Police Dept., City of San Jose,* 901 F.2d 758, 761 (9th Cir.1990). Inclusion of the 1980 data not only would have failed to improve the reliability of the 1975 and 1977 data, but would have improperly obscured the discriminatory effects of the earlier examinations.

This evidence indicates that the verdict of disparate impact based on the 1975 and 1977 examinations was supported by substantial evidence.

D. *Job Relatedness Defense to Disparate Impact Claim*

[24] Defendant-appellants failed to produce any evidence tending to show that the 1975 and 1977 examinations were related to legitimate job requirements. They contend, instead, that becasue Bouman delayed in bringing her claim, the County no longer has the validating documentation that would have shown that the 1975 examination was not discriminatory. Such evidence, appellants claim, was lost or destroyed in the normal course of business. Accordingly, the County argues, the doctrine of laches bars Bouman's disparate impact claim.

Appellants contend that because Bouman did not file a discrimination charge after appealing to the Director of Personnel about her score on the 1975 examination, the laches defense applies. However, "(i)t is extremely rare for laches to be effectively invoked when a plaintiff has filed his [or her] action before limitations in an analogous action at law has run." *Shouse v. Pierce County,* 559 F.2d 1142, 1147 (9th Cir.1977). Here, as

we noted above, the period for filing an analogous legal claim is 300 days. Bouman filed within 300 days of the applicable date for the limitations period, May 21, 1977.

This is not one of those "rare" cases in which laches applies despite the fact that the analogous statute of limitations has not run. The district court found that the County presented no evidence that the alleged supporting documentation would have existed had the claim been filed earlier. Mr. Hokama on behalf of the County testified that a technical report once existed that supported the validity of the examination. The district court was entitled to find, and did find, that this testimony was not credible. Moreover, even if the evidence had existed, it is reasonable to expect appellants to have maintained this material for three years since the examination was being used as the basis for promotions for the two years following its administration. Consequently, the district court's finding that the defendants' failure to produce validation data is not attributable to any delay by Bouman is not clearly erroneous.

Although the County offered no validation evidence, the County did offer expert testimony that the statistical differences in performance between men and women correlated with other factors. In particular, the County's expert offered evidence that if one looks at individuals who were hired at approximately the same time and considers individuals with comparable prior experience with departmental examinations, there is no statistically significant disparity between the performance of men and women. According to the County's expert, the longer a test-taker has been a Deputy Sheriff the higher he or she is likely to score on the sergeant examination, and second-time test-takers score higher, on the average,

than first-time test-takers. Thus, the County contends that the disparity in performance between men and women generally is attributable to the fact that, on the average, women had fewer years of experience than men and were more likely than men to be first-time test-takers.

The district court rejected the County's analysis based on its general view that Bouman's experts were more believable, without actually stating that the County's expert was incorrect in his assessment that the disparate performance correlated with disparate experiences. A district judge may accept some statistical inferences and reject others based upon the perception of the oral and documentary evidence before him. *See Contreras,* 656 F.2d at 1273. However, we need not decide whether the district judge was entitled to reject the statistical evidence offered by the County on this point, because we find the County's explanation inadequate for an entirely separate reason.

[25] Once Bouman proved a *prima facie* case of disparate impact, the County was obligated to validate the examination by showing that it is a realistic measure of job performance. *See Albermarle Paper Co. v. Moody,* 422 U.S. 405, 426-427, 95 S.Ct. 2362, 2375-2376, 45 L.Ed.2d 280 (1975). Even assuming that the County's expert successfully demonstrated that the disparate impact in this case resulted from the fact that men had more experience as Deputy Sheriffs and in taking the examination, this in no way excused the County from its obligation to validate. The County cites no authority, nor have we found any, for the proposition that a defendant need not validate an examination if the disparate impact of that examination correlates with some facially non-discriminatory factor or factors. After

all, the whole point of a disparate impact challenge is that a facially non-discriminatory employment or promotion device—in this case an examination—has a discriminatory *effect*. It would be odd indeed if a defendant whose facially non-discriminatory examination which has a disparate impact could escape the obligation to validate the examination merely by pointing to some *other* facially non-discriminatory factor that correlates with the disparate impact. The County's failure to validate cannot be excused simply by the correlation between success on the examination and experience.[3]

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[3]We note that the County has not even attempted to validate the supposedly neutral factors of years of experience and familiarity with departmental examinations. While we in no way suggest that evidence that these factors were significantly related to job performance would have excused the County from its obligation to validate the *examination*, the County's failure to offer such evidence provides an additional basis for our conclusion that the County did not meet its production burden with respect to job-relatedness.

It is hardly self-evident that promotions based on years of experience serve legitimate employment goals. A certain level of experience may result in a deputy sheriff's attaining skills that are useful for a sergeant. However, the County has made no effort to show what level of experience is required or to identify what skills deputy sheriffs gain through experience. For all we know, too much experience may impede one's ability to perform the duties of sergeant. Deputy sheriffs may experience "burn-out" or become jaded to their duties over time. We can only speculate as to the effect of experience because the County failed to introduce any evidence at all on the question.

The County also failed to produce any evidence that familiarity with departmental examinations makes an applicant a better sergeant. Indeed, it would have been remarkable if the County had produced such evidence. In our view, the fact that applicants who were familiar with departmental examinations scored higher, on the average, than those who were not, casts additional doubt on the value of the examination.

Thus, there was no evidence in the record of a legitimate business justification for the use of the 1975 and 1977 examinations. Consequently, the district court did not err in concluding that the significant adverse impact on women of those examinations was the result of discrimination.

E. *Bouman's Retaliation Claim*

The County argues that the district court incorrectly ruled in favor of Bouman on her charge of retaliation in response to filing a complaint with the EEOC. A finding of discriminatory intent in a Title VII case is a question of fact, reviewed under the clearly erroneous standard. *Jauregui v. City of Glendale,* 852 F.2d 1128, 1132 (9th Cir.1988).

The district court found that the County retaliated against Bouman for filing a complaint with the EEOC and that it was well known throughout the Department that she had engaged in Title VII protected activity. Bouman testified that she applied for a transfer to the Norwalk station after having been turned for a transfer to the Lakewood station. After she was denied the Norwalk transfer, she called the Norwalk station captain, Captain Portesi. Bouman testified that Portesi told her she should "stop doing things like this" [filing grievances] and that he was aware of the fact that she had filed complaints with outside governmental agencies. He also admitted that his lieutenant pressured him into not accepting someone who had filed grievances.

The evidence showed that members of the Sheriff's Department were aware of Bouman's EEOC complaint and denied her an employment benefit because she had exercised her right to file with the agency. The district

court evaluated the evidence of retaliation and concluded that her supervisors had a discriminatory motive in refusing plaintiff's request for a transfer. To the extent that this conclusion rested on an assessment of the credibility of the witnesses, the district court's evaluations of which witness was most credible should be given deference. *Bessemer City,* 470 U.S. at 573, 105 S.Ct. at 1511.

[26] Appellants argue that Bouman should have filed a charge with the EEOC about her retaliation complaint and that since she did not her claim is barred. In *Stache v. International Union of Bricklayers,* 852 F.2d 1231 (9th Cir.1988) *cert. denied,* ___ U.S.___, 110 S.Ct. 64, 107 L.Ed.2d 32 (1989), the court rejected a retaliation claim where the EEOC charge named only the local union and the suit named the international union, a different party. The court found that a claim against the international union was not "like or reasonably related to the allegations of the EEOC charge" against the local union. *Id.* at 1234. This holding does not, however, prohibit a finding of "reasonable relation" between a discrimination and a retaliation complaint against *the same party.*

The County also disagrees with the district court's finding that the retaliation claim is "reasonably related" to her prior EEOC charge of discrimination and thus may be considered under *Oubichon v. North American Rockwell Corp.,* 482 F.2d 569, 571 (9th Cir.1973) and *Ramirez v. National Distillers and Chemical Corporation,* 586 F.2d 1315, 1318-1319 (9th Cir.1978). The evidence that she was told that she should stop filing grievances shows that her retaliation claim is "reasonably related" to her prior sex discrimination claim.

[27] The County contends that plaintiff showed no adverse employment decision resulting from the denial of her transfer. Bouman must show that the County took some action in response to her exercise of Title VII rights. *Gunther v. County of Washington,* 623 F.2d 1303, 1314 (9th Cir.1979). In *Ruggles v. California Polytechnic State University,* 797 F.2d 782, 786 (9th Cir.1986), we held that "the closing of a job to plaintiff and the loss of opportunity even to compete for the position" established an adverse employment decision resulting from retaliation. Bouman need not show that she was fired, demoted or suffered some financial loss as a result. The fact that the position was not made available to her because of her involvement in protected activities is sufficient.

The County also argues that the reason Bouman was not transferred was her "attitude, immaturity and failure to understand her role as a Deputy Sheriff." The district court concluded that these reasons were a pretext for its discriminatory motives. The lower court noted that Bouman had received excellent performance evaluations near the time when she asked for a transfer. The district court also found persuasive evidence that she was reprimanded for an incident occurring outside the station involving her child, while her husband, who was also a Sheriff, received no such reprimand. The judge concluded that it appeared that females were treated differently with regard to such matters. On the basis of the evidence presented and the reasons given by the district court, the conclusion that the proffered reasons for refusing the transfer were pretextual is not clearly erroneous.

IV. Federal Jurisdiction over FEHA Claims

[28] The County contends that the federal courts have

no subject matter jurisdiction over claims brought under the California Fair Employment and Housing Act (FEHA), Cal.Gov.Code § 12900 *et seq.* (1980). The statute states that California superior courts shall have jurisdiction over claims under the Act. Cal.Gov.Code § 12980. The County claims that this confers exclusive jurisdiction in the state court and that pendent jurisdiction does not apply. However, the statute does not state that its jurisdiction is exclusive, merely that state courts are authorized to hear such claims.

[29, 30] Federal courts may exercise pendent jurisdiction over state law claims arising from a nucleus of facts common to both the state and federal claims. *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). Bouman's state discrimination claim is related to her federal Title VII claim and can be adjudicated in federal court under the doctrine of pendent jurisdiction.

[31] The County also argues that Bouman's FEHA claim is barred by the statute of limitations. Plaintiff filed her complaint with the Department of Fair Employment and Housing on January 10, 1978. The DFEH issued an accusation on January 17, 1979, and then on September 21, 1979, notified Bouman that her investigation had been terminated and that she had one year from that date to file a civil action. The County contends that under Cal.Gov.Code § 12981, since the department issued the accusation more than 150 days after the complaint was filed, it was divested of jurisdiction to issue a right-to-sue letter. However, a person receiving a right-to-sue letter has one year thereafter to file a claim. *Carmichael v. Alfano Temporary Personnel,* 223 Cal.App.3d 363, 272 Cal.Rptr. 737 (4th Dist.1990), *reh'g. denied,* 224

Cal.App.3d 85D (1990). Bouman's filing on April 7, 1980 complies with FEHA's requirements that she sue within one year of receivng the required letter and is, therefore, not time-barred.

V. The County's Liability under 42 U.S.C. § 1983

The County argues that for it to be liable under 42 U.S.C. § 1983, Bouman must prove that officials with final policymaking authority approved of or tolerated the alleged discriminatory policy. *See St. Louis v. Praprotnik,*485 U.S. 112, 123, 108 S.Ct. 915, 923-24, 99 L.Ed.2d 107 (1988). California law dictates that a county may exercise its powers only through the Board of Supervisors or through agents and officers acting under the Board's authority or authority conferred by law. Cal.Gov.Code § 23005. The Los Angeles County Charter specifies that the County's powers may be exercised only by the "Board of Supervisors or by agents and officers acting *under their authority* or by authority of the law of this Charter." Los Angeles County Charter, Article I, § 2 (emphasis added). The County argues that there is no allegation or proof that the Board of Supervisors or persons authorized by them committed wrongful acts.

Bouman contends that Sheriff Block and Sergeant Knox are the final policymakers. She contends that Knox, as the Chief of the Administrative Division and head of the department responsible for the examination and employment practices, was the driving force behind the violation of her constitutional rights.

The Supreme Court announced in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 701, 98 S.Ct. 2018, 2041, 56 L.Ed.2d 611 (1978), that municipalities are not immune from liability under § 1983.

However, it rejected the *respondent superior* theory and held that municipalities could be held liable only when an injury was inflicted by a government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694, 98 S.Ct. at 2037.

"The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable." *Pembaur v. Cincinnati,* 475 U.S. 469, 482-83, 106 S.Ct. 1292, 1299-1300, 89 L.Ed.2d 452 (1986). The example *Pembaur* uses to illustrate that authority to make policy confers liability under § 1983 is directly on point with this case:

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal libility. Instead, if county employment policy were set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner, the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

Pembaur, 475 U.S. at 483, n. 12, 106 S.Ct. at 1300 n. 12 (emphasis in original). Thus, it is crucial to determine whether the Sheriff or members of his department have been delegated the authority to make decisions about employment *policy.*

[32] Identification of officials with policymaking authority is a question governed by state law. *Praprotnik,* 485 U.S. at 124, 108 S.Ct. at 924. The district court did not address this question. Were the question purely one of law, we might have occasion to resolve it on this appeal. *Cf. Salve Regina College v. Russell,* ___ U.S. ___, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) (in diversity case, federal appeals court should not defer to federal district court's interpretation of law of the state in which district court is located). However, the question whether the Board of Supervisors delegated to the Sheriff's Department the authority to make employment policy decisions involves unresolved issues of fact as well, and the district court made no factual findings with respect to such issues. Thus, we remand to the district court for a determination under California and Los Angeles County law of who has authority to make employment policy and for a finding of fact as to whether the Board of Supervisors delegated that authority to the Sheriff's Department.

[33] In addition to examining the applicable state and county statutes, the district court should examine whether "a subordinate's decision is subject to review by the municipality's authorized policymakers." *Praprotnik,* 485 U.S. at 127, 108 S.Ct. at 926. If the authorized policymakers retain the authority to measure the official's conduct for conformance with *their* policies, or if they approve a subordinate's decision and the basis for it, their ratification would be chargeable to the

municipality because their decision is final. *Id.* (emphasis in the original.

[34] Even if the district court finds that the alleged discriminatory practices did not arise from a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," Bouman may proceed against the County on a theory that the County engaged in a "custom" of discrimination. *Monell,* 436 U.S. at 690-691, 98 S.Ct. at 2035-2036. If a practice is so permanent and well settled as to constitute a "custom or usage" with the force of law, a plaintiff may proceed in a § 1983 action, despite the absence of written authorization or express municipal policy. *Praprotnik,* 485 U.S. at 127, 108 S.Ct. at 926, (citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 167-168, 90 S.Ct. 1598, 1613-1614, 26 L.Ed.2d 142 (1970)). Bouman contends that she proved that the Sheriff's Department engaged in pervasive sexually discriminatory practices over a prolonged period of time. Yet, there is no finding in the Memorandum After Trial or the Amended Memorandum After Trial of a finding of a "custom" of discrimination in the Sheriff's Department. As an alternative theory upon which the County of Los Angeles may be liable, we remand to the district court for a determination of whether the discriminatory practices constituted a "custom" for which the County may be held liable.

VI. Class Certification

The determination as to whether to certify a class is committed to the discretion of the district court and will not be disturbed on appeal absent a showing of abuse of discretion. *Marshall v. Holiday Magic Inc.,* 550 F.2d 1173, 1176 (9th Cir.1977).

The County argues that the district court erred in certifying the class action in this case by failing to hold an evidentiary hearing to determine what common questions of law and fact existed between plaintiff and the purported class. The County contends that the court did not engage in a "rigorous examination" of the factors enumerated in F.R.C.P. 23(a) regarding the establishment of a class action. That rule requires the litigant to establish "numerosity, commonality, typicality and adequacy of representation" of the class members. *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 156, 102 S.Ct. 2364, 2370, 72 L.Ed.2d 740 (1982).

The district court asked the parties to brief the issue of the class certification and announced its ruling on November 3, 1980. The County contends that Judge Takasugi failed to state adequate grounds for his decision. A review of the transcript indicates that the judge reviewed each of the elements required for a class under Rule 23(a) and stated briefly why each was satisfied.

[35] In *Falcon,* the Court required a "specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent." *Id.* at 158, 102 S.Ct. at 2371. On this basis, the County objects to the lack of an evidentiary hearing on the common questions of fact and law between the plaintiff and the proposed class. This contention is unsupported. The district court asked the parties to brief the issue of class certification, including the commonality question. When the judge announced his ruling on November 3, 1980, he stated that there were common questions in that "plaintiff is attacking defendants' discriminatory practices against females, and this is not just as it applied

to plaintiff only." This statement identifies a common legal issue, discrimination against women, and a common factual problem, discrimination as applied in the Sheriff's Department. The district court analyzed whether the required elements were present to certify a class action and did not err in granting that certification.

The County also contends that the findings of intentional discrimination against Bouman indicate that there was no commonality between her and the certified class. They argue that she was not, therefore, a typical representative of the class. The discrimination findings, however, can be read as supporting the class' claims as well as Bouman's. *See Nehmer v. U.S. Veterans Administration,* 118 F.R.D. 113, 125 (N.D.Cal.1987) (all plaintiffs have suffered the same kind of harm and are proper plaintiffs).

Moreover, findings of this nature do not undermine the conclusion that the class certification was proper. *Bernard v. City of Palo Alto,* 699 F.2d 1023, 1026 (9th Cir.1983). The ultimate disposition of the class representative's claim does not affect the disposition of the class' claim. *Id.* The district court's class certification was proper.

VII. Injunctive Relief

As injunctive relief the district court ordered the County to develop a "validated" sergeant examination and to hire female sergeants consistent with their percentage representation as deputies until appellants instituted validated selection procedures. The County contends that this relief was improper because any showing of adverse impact was *de minimus* so that the relief is not proper. Appellants also argue that the

subsequent sergeant examinations promoted more women so the violation can now be considered moot under *County of Los Angeles v. Davis,* 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979).

[36] So long as a district court's decision to issue injunctive relief is not based on an incorrect interpretation of the law, it is reviewed for an abuse of discretion. *EEOC v. Hacienda Hotel,* 881 F.2d 1504, 1519 (9th Cir.1989).

Before the injunction was ordered, both parties submitted briefs on the issue. After considering their arguments, the district court ordered that a permanent injunction be issued, requiring, among other things, that appellants develop a valid sergeant examination.

[37, 38] District courts have broad equitable powers to fashion relief for violations of Title VII that will eliminate the effects of past discrimination. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). A court may order injunctive relief where there are not sufficient assurances that the employer is unlikely to repeat its discriminatory actions. *E.E.O.C. v. Goodyear Aerospace Corp.,* 813 F.2d 1539, 1544-45 (9th Cir.1987). Even though the performance of women may have improved on the 1980 examination, there is still no showing that it is a valid, job-related test. Furthermore, as we stated in *Goodyear Aerospace,* curative action at the eleventh hour does not prove that the employer is unlikely to discriminate again. *Id.* A claim for injunctive relief is not moot unless it can be said with assurance that the violation will not recur. *County of Los Angeles v. Davis,* 440 U.S. at 631, 99 S.Ct. at 1383.

[39] Furthermore, Bouman offered statistically significant proof of discrimination. This evidence is not

"de minimus" as defendants contend, but meets federal standards for establishing a *prima facie* case of discrimination. Defendants were unable to advance a non-discriminatory reason for the results which occurred. The findings of discrimination made it proper to order injunctive relief.

VIII. Punitive Damages Award

Punitive damages of $106,523,60 were assessed against appellant John Knox, Chief of the Administrative Division of the Los Angeles County Sheriff's Department. The County contests this award as excessive and not based on any findings of fact.

Under *Smith v. Wade,* 461 U.S. 30, 46-47, 103 S.Ct. 1625, 1635-1636, 75 L.Ed.2d 632 (1983), "punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." The district court did not state its reasons for the punitive damages award against Knox. However, in the amended memorandum after trial, the district court noted that Inspector White and Commander Knox testified that until a few days before trial, they had not seen the report which showed sergeant vacancies to which Bouman could have been promoted. The district court found this testimony not credible and defendant Knox' testimony regarding the lack of vacancies "highly suspect, sufficient to make a finding of malice, oppression, fraud and bad faith." The court concluded that based on the evidence and relative credibility of the witnesses, vacancies existed at the time the eligibility list expired and sex discrimination was a factor in her non-promotion.

[40] It is unclear whether the district court based the punitive damages solely on Knox' testimony at trial or

on his allegedly discriminatory actions which prevented her promotion. *Briscoe v. Lahue,* 460 US. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1982) prohibits plaintiffs from bringing suit under 42 U.S.C. § 1983 based on allegedly perjurous testimony at trial or during pretrial proceedings. While perjurous testimony cannot form the basis for a cause of action under § 1983, it has not been decided whether in a proper § 1983 action, perjury could form the basis for assessing punitive damages. However, this case involves testimony which is only "highly suspect," not perjurous.

[41] We need not reach the question of whether a punitive damages award would be justified in an ongoing § 1983 prosecution where the witness has given "highly suspect" testimony, because the record indicates that there were other not well-articulated reasons which may justify the imposition of punitive damages. The district court concluded that Knox' actions before trial constituted unlawful sex discrimination. The district court suggested that Knox may have suppressed the vacancy report or refused to promote Bouman despite his knowledge of vacancies. We remand to the district court for an articulation of its reasons for imposing punitive damages and a discussion of why Knox' actions were "evil" or exhibited "reckless indifference" to Bouman's civil rights such as to justify punitive damages under § 1983.

A punitive damages award may also be made under California law for "oppression, fraud or malice." Cal.Civ.Code § 3294 (West 1970); *Commodore Home Systems, Inc. v. Superior Court,* 32 Cal.3d 211, 215, 185 Cal.Rptr. 270, 649 P.2d 912 (1982). On remand, the district court should articulate the reasons, if any,

why Knox's behavior evidenced sufficient "oppression, fraud or malice" to justify punitive damages.

[42] In the event that the district court on remand assesses punitive damages, we address two other questions appellants raise about the punitive damages award. Appellants contest the amount of the award, $106,523.60, as excessive. That amount is double the back-pay award. A reviewing court must uphold an award of damages whenever possible and all presumptions are in favor of the judgment. *Bertero v. National General Corp.*, 13 Cal.3d 43, 61 118 Cal.Rptr. 184, 529 P.2d 608 (1974).

[43-45] While California law requires that punitive damages bear a reasonable relationship to compensatory damages, there is no fixed ratio or formula for determining the proper proportion between the two. *Transgo Inc. v. AJAC Transmission Parts Corp.*, 768 F.2d 1001 (1985) (citing *Liodas v. Sahadi,* 19 Cal.3d 278, 284, 137 Cal.Rptr. 635, 562 P.2d 316 (1977), *cert. denied,* 474 U.S. 1059, 106 S.Ct. 802, 88 L.Ed.2d 778 (1986)). The amount of compensatory damages is a relevant yardstick by which to measure the appropriateness of a punitive award. *Moore v. American United Life Co.*, 150 Cal.App.3d 610, 636-637, 197 Cal.Rptr. 878 (1984). Twice the compensatory damages is a reasonable award. *See Gagnon v. Continental Casualty Co.*, 211 Cal.App.3d 1598, 1603-1605, 260 Cal.Rptr. 305 (1989) (citing *Wetherbee v. United Ins. Co. of America,* 18 Cal.App.3d 266, 270-272, 95 Cal.Rptr. 678 (1971) (upholding punitive to compensatory damages ratio of 190.5 to 1)). A punitive damages award of twice the back-pay award is reasonable and an award of that magnitude would be affirmed.

[46] The County also argues that Knox's recent retirement from the Sheriff's Department vitiates the deterrent function the punitive damages award is supposed to serve and indicates that punitive damages were not justified. Punitive damages are awarded to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future. *Wade,* 461 U.S. at 54, 103 S.Ct. at 1639. In this case, however, the deterrent function is not lost due to Knox's retirement since the award would send a message to others in the Sheriff's Department that they may be liable individually for their actions in violation of a person's civil rights. The district court did not abuse its discretion in assessing punitive damages against Knox, despite his recent retirement.

IX. Back Pay for the Class

Bouman argues that the class members should have been awarded back pay for the County's failure to promote them because of discriminatory practices. The district court gave no reasons why it denied the class back pay.

[47] Where discrimination is found, back pay should be denied only for reasons which would not frustrate the purpose of eradicating discrimination. *Albemarie Paper v. Moody,* 442 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975). The award of back pay is discretionary and vested in the district court. *Id.* However, a district court which declines to award back pay must carefully articulate its reasons for doing so. *Id.* at n. 14.

We remand this issue to the district court for an elaboration of the reasons why the class was denied back pay. Once the reasons are articulated, a reviewing court

can determine whether the reasons for denying back pay meet the standards set forth in *Albemarle* for the denial of such relief. *Id.* at 421-425, 95 S.Ct. at 2373-2375.

X. Attorney's Fees

[48] We review the district court's determination of the amount of the attorney's fees award for abuse of discretion. *Jordan v. Multnomah County,* 815 F.2d 1258, 1261 (9th Cir.1987). The abuse of discretion standard applies not only to the basic fee computation, but also to the multiplier. *Hall v. Bolger,* 768 F.2d 1148, 1150 (9th Cir.1985).

A. *The Lodestar Calculation*

[49] Attorney's fees may be awarded by calculating the lodestar amount, the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate. *Lindy Bros. Bldrs. Inc., v. American Radiator & Standard Sanitary Corp.,* 540 F.2d 102, 117 (3rd Cir.1976). This court reviews the award to see if it was the "product of reasonable hours times a reasonable rate." *Blum v. Stenson,* 465 U.S. 886, 897, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984).

[50] The County attacks the lodestar rate by questioning Bouman's attorney Harley's expertise and by finding fault with his time records. This attack is based upon an auditor's examination of the time records. Among other things, the auditor complains that he is unable to compare Harley's fees with those charged other clients because such information was blocked from the client information sheets. Yet, the parties had earlier stipulated to such a procedure to protect their clients' confidences. The County admits that the time records produced were very detailed. Appellants produced no

evidence to show that the district court committed clear error in calculating the hourly base.

The County also attacks the rate used to calculate the lodestar amount. Bouman submitted several declarations stating that the rate was the prevailing market rate in the relevant community. This evidence is sufficient to establish the appropriate rate for lodestar purposes. *Chalmers v. City of Los Angeles,* 796 F.2d 1205, 1210-1211 (9th Cir.1986). The district court did not commit clear error in adopting these rates.

[51] The County also attacks the award to the extent that an adjustment was made for lost interest and inflation. The district court used current hourly rates to compensate for the delay in receiving payment. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 716, 107 S.Ct. 3078, 3081-3082, 97 L.Ed.2d 585 (1987). This adjustment would also take into account lost interest and inflation. It was not an abuse of discretion for the district court to adjust the rate to compensate for the delay.

B. *Multiplier for Attorney's Fees Award*

[52] The County contests the district court's decision to enhance the lodestar amount by one-third to account for the risk of non-payment Bouman's lawyers faced if they lost the case. In *Pennsylvania v. Del. Valley Citizens' Council,* 483 U.S. at 730-731, 107 S.Ct. at 3089-3090, the Court held that a multiplier was permissible to compensate for the risk that no fee will be won if the district court makes specific findings that without that enhancement plaintiff would have faced substantial difficulties in securing counsel.

In the *Bouman* case, the district court ordered an enhancement of at least one-third of the fees attributed

to Mr. Harley. Judge Tagasuki found that Bouman contacted at least 16 lawyers, all of whom declined to take her case because there was little or no prospect of earning a fee. It also found that Bouman would have faced even more difficulties securing counsel if no multiplier was available. The district court awarded a one and one-third multiplier based upon this evidence and a finding that the market charges a premium for contingent fee cases. The specific reasons set forth justify multiplying the lodestar by a minimum of one and one-third and satisfy the requirements under *Del Valley.*

C. *Bouman's Challenge to the Lodestar Multiplier*

Bouman on cross-appeal contends that she should have been awarded a multiplier of 2.0 or double the lodestar amount. Bouman relies on *Fadhl v. City and County of San Francisco,* 859 F.2d 649, 650-651 (9th Cir.1988), where the court upheld a multiplier of 2.0 to reflect the market treatment accorded to contingency cases in San Francisco. We review for abuse of discretion the district court's decision to use a one and one-third multiplier to calculate the attorney's fees award.

The district court concluded that Bouman met the test under *Delaware Valley II* for an enhancement of attorney's fees. Like Fadhl who visited 34 attorneys before finding one who would take her case, *see Fadhl,* 859 F.2d at 652, Bouman presented evidence that at least 16 lawyers turned her down before she found Mr. Harley. Judge Tagasugi ordered an enhancement "by at least one-third of the fees attributed to Mr. Harley."

Bouman argues that the Los Angeles market is comparable to San Francisco's and that her attorneys deserve a 2.0 multiplier. Bouman submitted to the trial

court a declaration from the attorney in *Fadhl*, Guy Saperstein, that the market rate is the same in San Francisco and Los Angeles. Based on his experience as a litigator and an expert on attorney's fees, Saperstein concluded that a multiplier of at least 2.0 is necessary to encourage lawyers in Los Angeles to take contingent fee Title VII cases. That argument appears reasonable to us.

The *Fadhl* case was decided in July 1988, only one month before the district court issued the attorney's fees award. The Bouman award makes no mention of *Fadhl*, nor does it discuss the comparability of market conditions in Los Angeles and San Francisco. We agree that Bouman is entitled to at least a one and one-third multiplier on Mr. Harley's time. We remand, however, for the district court to consider evidence of the market conditions in Los Angeles and determine whether she is entitled to the 2.0 multipler she has requested or some other multiplier in excess of the one and one-third figure the district court judge used.

D. *Attorney's Fees Award for Hunt and Herman*

The County challenges the award of attorney's fees for the 30 hours expended by Mr. Herman and the 50 hours expended by Mr. Hunt on the case. The district court's determination of the amount of the attorney's fees award is reviewed for abuse of discretion. *Jordan v. Multnomah County,* 815 F.2d 1258, 1261 (9th Cir.1987).

[53] The County claims that Harley, Bouman's primary lawyer, is not entitled to hire another lawyer. This claim is unsupported by any case law. Common experience indicates that lawyers often hire other lawyers to help

them with specific issues in the case. The County also contends Hunt has not provided enough detail as to how his time was spent. The district court's reduction in the number of hours expended by Hunt and Herman, to the extent they acted as experts and not attorneys, indicates that the district court considered Hunt's time spent on the case in some detail. Accordingly, the finding awarding attorney's fees based on Hunt's work is not clearly erroneous.

The County challenges the award of fees for Herman's time because his role does not justify a multiplier. Appellents recall only one appearance by Herman at a settlement conference in chambers. However, appellants' perception of what Herman did is no measure of his actual value to Bouman or of the amount of his work. The County contends that Herman's time sheets revealed that he mainly reviewed what had already been done or provided consulting services. The district court adjusted the award to account for the consulting hours. Herman's review may also have been critical to analyzing issues or documents affecting the case. The County has made no showing that the district court committed clear error by awarding attorney's fees based on the legal services Herman provided.

XI. Bill of Costs

A. *Timely Filing of Request for Costs*

Judgment for plaintiffs was entered in this action on March 30, 1988. Bouman filed her motion for attorney's fees on April 28, 1988. The district court issued an order on August 30, 1988, that: "Plaintiffs' bill of costs shall be deemed timely if filed and served within fifteen days after the issuance of this order." Accordingly, Bouman

filed a bill of costs pursuant to the district court's August 30th order on September 14, 1988.

Local Rule 16.3 for the Central District of California permits the prevailing party who is awarded costs 15 days after entry of judgment to file and serve a Bill of Costs. Time limits are set out clearly and "must be scrupulously observed by litigants." *Mollura v. Miller,* 621 F.2d 334, 336 (9th Cir.), *cert. denied,* 446 U.S. 918, 100 S.Ct. 1852, 64 L.Ed.2d 272 (1980). Bouman's request for costs was filed thirteen days later under the local rules.

We are empowered "for good cause shown" to enlarge the time limits prescribed by the Federal Rules of Appellate Procedure. Fed.R.App.P. 26(b). The issue is whether appellees have shown good cause for us to exercise our discretion to do so. *Id.*

[54] There is no evidence in the record showing why Bouman's bill of costs was filed after the time set out in the local rules. We remand for a determination of whether there was good cause for Bouman's untimely filing for costs.

B. *Expert Witness Fees as Costs*

The district court in its order of April 10, 1989 awarded expert witness fees as costs in the amounts of: $5,438.00 for Dr. James Kirkpatrick, $24,390.28 for Dr. Richard Harkness, $6,425.00 for Dr. Wallace Blishke, $3,555.00 for Mr. William Ruch and $74,221.22 for Mr. Richard Biddle. Bouman relies on state grounds to support the award of these attorney's fees as costs. The County challenges those grounds and argues that under federal law she is limited to $30.00 per day for expert witness testimony.

In its amended judgment of July 8, 1988, the district court entered judgment for plaintiff and the class she represents against the County of Los Angeles, the Los Angeles County Sheriff and John Knox. Liability was found based on violations of 42 U.S.C. § 2000e *et seq.*, 42 U.S.C. § 1983 and Cal.Gov.Code § 12900, the California Fair Employment and Housing Act.

[55, 56] Under the California Fair Employment and Housing Act, the court may award costs to the successful party. Cal.Gov.Code § 12965(b). When a plaintiff proceeds under multiple theories and prevails on her FEPA claims, she is entitled to attorney's fees under FEPA. *See generally Stache v. International Union of Bricklayers and Allied Craftsmen,* 852 F.2d 1231 (9th Cir.1988); *Ackerman v. Western Electric Co.,* 860 F.2d 1514 (9th Cir.1988). The district court had discretion to award costs under the California statute and did not abuse its discretion in doing so.

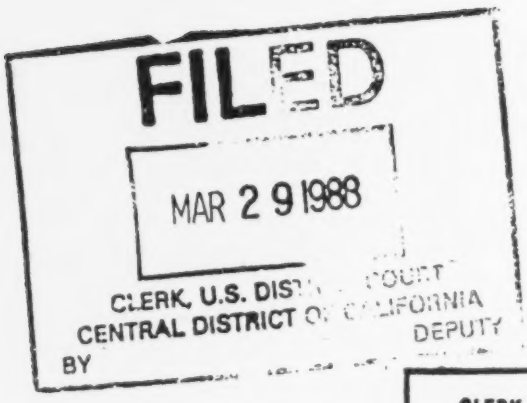
Alternatively, Bouman argues that these costs may be awarded to a Title VII plaintiff under 42 U.S.C. § 1988. That argument is not foreclosed by *West Virginia University Hospitals, Inc. v. Casey,* ___ U.S. ___, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991). Since there is an independent state ground for awarding costs, Bouman's costs were proper under § 12965(b) of the California FEPA.

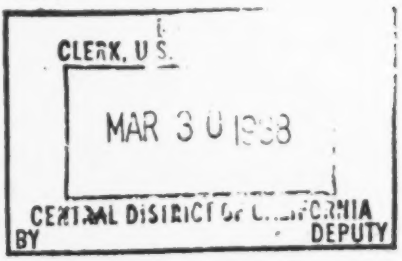
XII. Conclusion

In conclusion, we note that more than eleven years have passed since Bouman filed her case. On remand, we look for an early resolution of this case.

We REMAND to the district court for: 1) findings of fact and conclusions of law on who possesses the authority to make employment policy decisions for the

Sheriff's Department; 2) a statement of reasons why back pay was denied to the class; 3) an articulation of reasons why punitive damages are justified; 4) a determination of whether plaintiff is entitled to a multiplier of attorney's fees over one and one-third; and 4) a determination of whether there was good cause for Bouman's untimely filing for costs. If it is determined that the filing for costs was timely, the amount assessed as costs is AFFIRMED. The district court's findings and holdings on all other issues raised in this appeal are AFFIRMED, AFFIRMED IN PART AND REMANDED IN PART.





UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SUSAN L. BOUMAN, on behalf of herself and all others similarly situated, Plaintiffs, vs. PETER PITCHESS, et al., Defendants.	No. CV 80-1341 -RMT(Px)
AND RELATED ACTIONS.	AMENDED MEMORANDUM AFTER TRIAL

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

APPENDIX B

This matter has come before the court for trial by the court without a jury on the action by plaintiff Susan L. Bouman, on behalf of herself and others similarly situated, against defendants County of Los Angeles ("County"); the County's Sheriff's Department; the County's Department of Personnel ("DOP"); Peter Pitchess, the Sheriff of the County during the period relevant herein; John P. Knox, Chief of the Administrative Division of the Sheriff's Department; and the Association of Los Angeles Deputy Sheriffs ("ALADS").

As against defendants County, the Sheriff's Department, Pitchess and Knox, plaintiff claims a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*; 42 U.S.C. § 1983; and California Fair Employment and Housing Act, Calif. Government Code §§ 12900 *et seq.*; based on sex discrimination in promotions, assignments and transfers and on retaliation, and seeks injunctive relief, back pay, compensatory damages and punitive damages. Plaintiff seeks the same relief as against defendant DOP based on the utilization and preparation of the sergeant's promotional examinations. As against defendant ALADS, plaintiff seeks injunctive and make-whole relief based on a claim of retaliation in violation of Title VII.

Plaintiff was originally hired by the County as a deputy sheriff on October 1, 1971. In 1974 plaintiff applied for a promotion to sergeant in the Sheriff's Department. Having provided three years of service with the Department, she met the minimum time requirement to become eligible to take the examination. Plaintiff took the three-part examination with varying percentage weights attached to each part.

The exam parts and the weight of each part were as follows: (1) Written (40%); (2) Appraisal of Promotability (AP) (25%); and (3) Oral Interview (35%). Based on the written portion alone, the top 500 candidates, and those tied with the score of the 500th candidate, were assigned AP scores. The top 250 candidates, based on the combined written and AP scores and those tied with the score of the 250th candidate, were advanced to the oral interview.

Plaintiff achieved a score within the top 500 candidates on the written and was therefore eligible to receive an AP score and to further advance with the examination. Plaintiff obtained an AP of 100, the highest score attainable. She advanced to the oral interview stage and received a score of 87. As a result of her combined score on all three parts of the examination, plaintiff received an eligibility number of 120 on the initial certified eligibility list.

On or about June 25, 1975 plaintiff submitted a letter of appeal to the DOP of her oral interview score of 87 and alleged that the examination did not comply with Civil Service Rule 8.09 and further alleged that the examination discriminated against females in violation of Civil Service Rule 26.01. On August 25, 1975 plaintiff received a response to her letter from the Director of Personnel, Gordon T. Nesvig. The letter stated that her appeal was denied and that she had the right to request a hearing of the denial before the CSC by written request within ten business days of receipt of the letter. Plaintiff did not appeal the ruling of the August 25, 1975 letter from the Director of Personnel. Other members of the Sheriff's Department appealed their scores and, as a result of their successful appeals,

plaintiff's rank on the eligibility list dropped from 120 to 131.

On or about April 1, 1977 ALADS sent a letter to DOP complaining of the Sheriff's Department's failure to promote deputies from the existing eligibility list. This was followed by a letter on May 2, 1977 from ALADS to the CSC requesting a hearing on the Sheriff's Department's failure to promote deputies from the existing list. In the early part of May 1977 plaintiff became a member of ALADS. On or about May 17, 1977 ALADS sent a letter to the CSC complaining of the Sheriff's Department's failure to promote deputies from the existing eligibility list.

On May 21, 1977 the eligibility list expired. During the life of the list, 131 candidates were promoted to sergeant. Two of the candidates that were promoted had the same eligibility number and ranked above plaintiff. Four women were promoted above plaintiff. As the time the list expired, plaintiff was at the top of the list or "on the peg."

In the latter part of 1977 another examination was given for promotion to a sergeant's position.

I. PROMOTIONS

Plaintiff raises two challenges to defendants' promotion system: (1) plaintiff claims the test was discriminatory resulting in her attaining a discriminatorily low score and, therefore, low placement on the eligibility list and (2) plaintiff claims the expiration of the eligibility list when she was "on the peg" and at a time when vacancies existed for her promotion was discriminatory.

A. The Text

In addition to the 1975 sergeant's examination, which plaintiff took, she is also challenging the 1977 examination, which she did not take. Because plaintiff has demonstrated that she would have applied for the 1977 test but for the futility of competing with discriminatory practices, she has standing to challenge both examinations.

Plaintiff met her initial burden of showing adverse impact of both tests through her statistical evidence as explained by her expert witnesses. Although defendants attempted to controvert plaintiff's statistical evidence, the court finds the testimony of plaintiff's experts to be the more convincing. The statistical findings that sex was a factor is supported by the chi square analysis and the determination that the four-fifths rule was not met.

Plaintiff having established a prima facie case of discrimination on the 1975 and 1977 sergeant's examinations, the burden shifted to the Sheriff's Department to show that the examinations were job-related. Defendants failed to show job-relatedness and do not contend otherwise. Instead, defendants argue that

plaintiff delayed in bringing her claim and that such delay has deprived defendants of the opportunity to show job-relatedness. Defendants contend that plaintiff should be barred by laches because they no longer had validating documentation on January 10, 1978, when plaintiff filed her EEOC claim.

Plaintiff's claim is based on her nonpromotion upon the expiration of the eligibility list on May 21, 1977. Plaintiff's challenge of the test and of defendants' failure to promote her from the eligibility list accrued upon the expiration of the said list, and not before, because until the expiration of the list plaintiff had not yet suffered the nonpromotion. Accordingly, plaintiff's claims with the FEPC and the EEOC and her complaint herein have been timely filed pursuant to the statutory requirements.[FN1]

Although the statute of limitations is not a bar herein, defendants contend that there was a lack of diligence by plaintiff in filing her discrimination claim and that said lack of diligence prejudiced defendants because validating documentation did not exist in January 1978. However, defendants failed to present any evidence of lack of diligence on plaintiff's part and failed to show that validating documentation existed earlier.

Accordingly, plaintiff prevails as to her challenge to the 1975 and 1977 sergeant's examinations.

B. Nonselection from List

On May 21, 1977, when the eligibility list expired, plaintiff was at the top of the list. Plaintiff challenges her nonselection claiming that vacancies for her promotion existed and that her nonselection was due to sex discrimination. In response, defendants claim that no vacancies existed on May 21, 1977.

The Department Vacancy Factor Report of May 20, 1977 indicated that vacancies existed. But defendant Knox testified that said report was inaccurate because it did not account for officers out on extended leave of absence. However, defendants were unable to point to or produce any other records to indicate the lack of a vacancy. In fact, curiously, defendants claimed that the May 20, 1977 vacancy factor report, as well as all work sheets and source documents for the report, is missing.

Supporting plaintiff's evidence that vacancies existed is plaintiff's Exhibit 138, a comprehensive internal report prepared by Lt. Maher in January 1978 concerning plaintiff's sex discrimination charge. This report, which indicates that vacancies existed on May 20, 1977 was delivered to Captain Turner who read it and passed it through Inspector White to defendants Knox. Inspector White and defendant Knox testified that neither had seen Exhibit 138 until a few days before testifying at trial, which this court finds not credible. The court also finds defendant Knox' testimony regarding lack of vacancies to be highly suspect sufficient to make a finding of malice, oppression, fraud and bad faith.

Based on the evidence presented and the relative credibility of the witnesses, the court finds that vacancies existed on May 20, 1977 and at the time the eligibility list expired. The court further finds that the nonselection of plaintiff for promotion was due to sex discrimination.

II. RETALIATION CLAIM AGAINST DEFENDANTS OTHER THAN ALADS

A. PLAINTIFF'S RETALIATION COMPLAINT AGAINST THE SHERIFF'S DEPARTMENT

Plaintiff has claimed that the Sheriff's Department retaliated against her after having filed the EEOC charge by denying her request to transfer to Lakewood Station in March of 1978. In order to prove her claim under 42 U.S.C. § 2000e-3(a), plaintiff must establish: (1) protected participation or opportunity under Title VII known by the retaliator; (2) an adverse action against a person engaged in protected activity; and (3) a causal connection between the first two elements, that is, a retaliatory motive playing a part in the adverse actions. *See Gunther v. County of Washington*, 602 F.2d 887, 892 (9th Cir. 1979). Although plaintiff never filed a charge with the EEOC regarding these claims, it would appear that these claims of retaliation are reasonably related to her prior EEOC charges and the claims occurred while the EEOC was investigating plaintiff's initial charge. "When an employee seeks judicial relief from incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC." *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973); *Ramirez v. National Distillers and Chemical Corporation*, 586 F.2d 1315 (9th Cir. 1978).

Plaintiff applied for a transfer to Lakewood Station in March of 1978. Her transfer request was disapproved

by the Chief of the Patrol Division East, T.H. Van Minden, based upon the recommendations made by the Commander of Lakewood Station, Captain Merrick. The reason for denial of the transfer was not because of lack of vacancies. The transfer was denied because Captain Merrick believed that plaintiff's prior demonstrated performance at Lakewood Station from May 4, 1975 to March 16, 1976 displayed immaturity, lack of confidence in physically threatening incidents, an abrasive manner of dealing with the public, unreceptiveness to counseling, and because she listed Lakewood Station as her sixth preference. The basis for these beliefs of Captain Merrick appear to be unreliable and unfounded. The evidence indicates that during her career with the Sheriff's Department her written performance evaluations appeared to be leaning toward the outstanding level of performance. Her performance evaluations maintained by the DOP indicate that plaintiff received a rating of outstanding during the time period of February 1, 1975 to January 6, 1977. During this period, plaintiff was assigned to Lakewood. The Sheriff's Department attempts to discount plaintiff's evaulation by focusing on an incident wherein plaintiff was reprimanded for an incident involving her child while plaintiff was off duty. Plaintiff, during discussions with her supervisors at Lakewood Station, indicated that she did not feel it was a matter with which they should be concerned. It is this incident upon which Captain Merrick based his conclusion that plaintiff was unresponsive to counseling when she was reprimanded. It is interesting to note that plaintiff's husband, who was a member of the Sheriff's Department, was never reprimanded or counseled concerning his role in the incident. It would appear that females were treated differently. The denial of this transfer request would

appear to have been in retaliation for plaintiff's discrimination complaint. It was known throughout the Sheriff's Department that plaintiff had claimed sex discrimination. The reasons for denial of the transfer would appear to be pretextual in light of the written performance evaluations of plaintiff during that time.

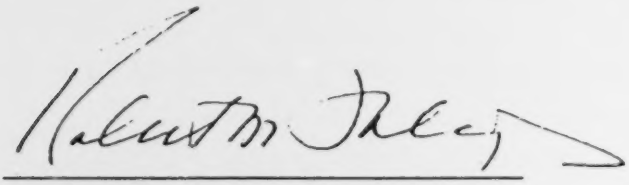
III. RETALIATION CLAIM AGAINST DEFENDANT ALADS

Plaintiff sues ALADS for violation of 42 U.S.C. § 2000e-3(a) by refusing to represent plaintiff before the Los Angeles County Civil Service Commission ("CSC") unless she withdrew her pending EEOC charge of discrimination against ALADS. In the Memorandum and Order RE FRCP, Rule 41(b) filed August 16, 1985 and entered August 21, 1985, the court found that plaintiff had established a prima facie case of retaliation. The burden, therefore, shifted to defendant ALADS to articulate a legitimate, nondiscriminatory reason to rebut the inference of retaliation.

Defendant ALADS contends that its refusal to represent plaintiff was not because she had filed a discrimination charge against ALADS with the EEOC, but because of the resulting conflict of interest. As was the case in *St. John v. Employment Development Department*, 642 F.2d 273, 274 (9th Cir. 1981), "the two [i.e., plaintiff's discrimination charge and the resulting conflict of interest)] are inseparable. As in *St. John*, the sole action by plaintiff herein that caused the refusal by defendant ALADS was the filing of the discrimination charge against defendant ALADS. Plaintiff did not take any other action to cause ALADS' refusal.

Defendant ALADS continues to argue that the conflict of interest is a legitimate, nondiscriminatory reason for its refusal. However, it is not a legitimate reason for refusing to reimburse plaintiff for hiring outside counsel. This court finds that the conflict of interest did not justify defendant ALADS' refusal to reimburse plaintiff for hiring outside counsel and that, therefore, defendant ALADS is liable to plaintiff for its violation of § 2000e-3(a).[FN2] Plaintiff did not seek or provide evidence to justify an award of punitive damages against ALADS.

Dated: 29 MAR 1988



ROBERT M. TAKASUGI
United States District Judge

FOOTNOTES

1. Although it appears to this court that patrol station assignment and transfers have been handled discriminatorily based on sex, any challenge thereto, as they relate to the examination procedures, is barred by the statute of limitations as being present effects of past discrimination. This is because, although such past acts of discrimination appear to have a discriminatory effect on performance on the examination, they are independent acts of discrimination unrelated to the defendants' examination procedures and systems. Such past acts of discrimination have an immediate discriminatory impact in the denial of assignments and transfers. Any discriminatory effect they have on subsequent performance on promotion examinations is incidental to said immediate discriminatory impact and only occurs upon the natural accrual of experience, or lack thereof. As such, any challenge to the denial of assignments or transfers accrues upon the immediate impact of denial and not upon the later incidental effect that denial of such experience has on examination performance.

The court notes that this limitations question may appear to have been differently addressed in its Memorandum and Order Re FRCP, Rule 41(b), filed August 16, 1985 and entered August 20, 1985, in which the court found the discriminatory practice in assignments and transfers to be part of a continuing pattern and practice of discrimination rather than present effects of past discrimination. The court, having now heard all the evidence, has determined that the discrimination in assignments and transfers was a part of a continuing pattern and practice of discrimination; but that pattern and practice was separate from the pattern and practice

of discrimination of which the examination procedure was a part. The reasons for this separateness are:

(a) the fact that the discrimination practiced in connection with the assignments and transfers appears to be factually separate from the discrimination underlying the examination procedures and systems and

(b) the remoteness in the causal link between the discrimination in assignments and transfers and the resulting poorer performance on promotion examinations (i.e., the causation chain is as follows: discrimination results in denial of assignment and transfers which results in less experience which results in poorer performance on the examination.) The accrual of less experience herein appears analogous to the accrual of (less) seniority in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

2. In addition to injunctive relief, plaintiff is entitled to attorneys fees incurred in her hearing before the CSC. However, plaintiff did not retain an attorney.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on October 21, 1991, I served the within *Petition For A Writ Of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

Clerk, United States Court
of Appeals
Ninth Judicial Circuit
50 United Nations Plaza
Room 59
San Francisco, CA 94102-4909
(415) 556-7340

Dennis M. Harley, Esq.
Law Office of Dennis Harley
2 North Lake Avenue
Suite 470
Pasadena, California 91101

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 21, 1991, at Los Angeles, California.

Betty J. Malloy
(Original signed)

(2)

No. 91-673

In The

Supreme Court of the United States

October Term, 1991

SHERMAN BLOCK, SHERIFF OF LOS ANGELES COUNTY; COUNTY OF LOS ANGELES; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; JOHN P. KNOX,

Petitioners,

v.

SUSAN L. BOUMAN, on behalf of herself and all others similarly situated,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Counsel for Respondents

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QUESTION PRESENTED FOR REVIEW

Do the Petitioners' complaints regarding standing, adverse impact, and retaliation warrant review by this Court on the grant of certiorari?

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TABLE OF AUTHORITIES – Continued

RESPONDENTS' BRIEF IN OPPOSITION

Respondent Susan L. Bouman on behalf of herself and all others similarly situated respectfully submits that because of the detailed fact based findings of the district court the petition for a writ of certiorari received on October 22, 1991 should be denied and files this brief in opposition.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 940 F.2d 1211 (9th Cir. 1991) and is partially reproduced in the Petitioners' Appendix (A-1 to A-65). Petitioners have failed to include the appendix to the court of appeals decision. Respondents have included the missing documents as Appendix A-1 to A-2 to this opposition.

The Opinion of the United States District Court is unreported in the official reports and is unofficially reported, *Bouman, et al. v. Pitchess, et al.*, 42 EPD 46,307 (C.D. Ca. 1985), *Bouman, et al. v. Pitchess, et al.*, 42 EPD 46,318 (C.D. Ca. 1987), *Bouman, et al. v. Pitchess, et al.*, 46 EPD 37,947 (C.D. Ca. 1988) and *Bouman, et al. v. Pitchess, et al.*, 47 EPD 53,226 (C.D. Ca. 1988). The Amended Memorandum After Trial is reproduced in the Petitioners' Appendix (B-1 to B-11).

SUPPLEMENTAL STATEMENT OF THE CASE

Susan L. Bouman was hired by the County of Los Angeles as a Deputy Sheriff in 1971. *Bouman v. Block*, 940 F.2d 1211, 1217 (9th Cir. 1991). In 1974 she applied for a promotion to sergeant and took a three-part examination in 1975 to qualify for promotion. *Id.* at 1217.

From the examination score a promotion eligibility list was developed and used for two years. At the time the list expired on May 21, 1977, Bouman was at the top of the list and would have received the next appointment. From the list, four females and 127 males were promoted. Bouman was not promoted from this list. *Id.*

Prior to the list's expiration, Bouman inquired about her chances of appointment. Bouman testified that her superior "basically told her not to hold her breath." *Id.* Others in the department also knew that Bouman was not likely to be promoted. One deputy from another sheriff's station who was behind Bouman on the eligibility list called her because he heard that she was not going to be promoted and was concerned about how this would affect his promotion chances. *Id.*

The Employers'[1] own investigation concluded that there was strong evidence of sex discrimination on the examination and as regards the decision to not promote Bouman. After presentation of the investigative report,

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[1] Petitioner Sherman Block is the elected sheriff of Petitioner Los Angeles County. John P. Knox was in charge of personnel matters for Petitioner Los Angeles County Sheriff's Department and a subordinate officer of the Sheriff. They are referred to herein collectively as "the Employer."

the investigator was ordered to prepare a false communication. Higher ranked officers denied the existence of the investigative report even after confronted with a copy during cross-examination, and the district court found such testimony "not credible."

Another sergeant examination was administered in 1977, but Bouman did not take it because she believed it would be futile and that the testing procedures discriminated against women.

Bouman brought several claims on behalf of herself and the class. For the class, she alleged that the sergeant examinations discriminated against women. She argued that the design of the 1975 examination was flawed. Bouman submitted statistical evidence showing that the examination had a statistically significant disparate impact on women. The Employer admitted that women deputies suffered adverse impact on the written portion of the 1975 examination, but argued that any differences in performance were not statistically significant and were explained by nondiscriminatory factors such as job experience. *Id.* at 1218. Bouman also contended that the Employer engaged in intentional discrimination against her and retaliated against her in connection with a request for transfer for filing a claim with the United States Equal Employment Opportunity Commission. *Id.* at 1218.

Bouman argued that job experiences in the Los Angeles County Sheriff's Department were not gained in a neutral fashion, citing the discriminatory assignments she and other female deputies endured. Bouman was not permitted to serve in a solo radio car at night in certain

areas because her supervisors felt it would be inappropriate. Meanwhile, male deputies were allowed to serve in such areas. The station commander also had a policy of having women deputies rotate on the station front desk. At one point, she was told to leave a radio car and work the station front desk. Men were not required to rotate on the front desk. *Id.*

The district court, after a twenty-two day trial with over fifty witnesses, found that the Employer engaged in intentional retaliatory discrimination against Bouman for filing her complaint with the EEOC. The district court also found that the Employer for years used discriminatory promotional examinations, which had a statistically significant disparate impact on women, and engaged in intentional discrimination against Bouman by failing to promote her to sergeant. The court of appeals found that substantial evidence supported those conclusions and the district court did not commit clear error. *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

The Petitioners have presented three "categories" of complaint, labeled "standing," "adverse impact," and "retaliation." An examination of the Petitioners' current contentions amply reveals that the decision below was properly rendered with respect to each type of complaint. Moreover, in the absence of any special and important reasons for granting certiorari, conflict among courts or any other compelling reason warranting a grant of certiorari, this case does not merit this Court's review.

SUMMARY OF ARGUMENT

This case presents no "special and important" reason warranting this Court's review. Sup. Ct. R. 10. It involves no conflict between the circuits, departure from the usual courses of proceedings, or any other reason to grant certiorari. The case involves nothing more than a heavily fact based decision which was proper on the merits. Moreover, the decision of the court below will have none of the asserted ill social effects, but might, admittedly, encourage employers to observe the dictates of the law.

STANDING

The court of appeals properly held that the Respondent had standing to contest both the 1975 and the 1977 examinations. *Bouman v. Block*, 940 F.2d 1211, 1221-22 (9th Cir. 1991). The Petitioners' limitations claims regarding the 1975 exam are belied by the applicable case law and present no special or important issue for resolution by this Court.

In its decision below, the court analyzed the Petitioners' limitations argument by employing as the date of accrual of the claims the date of the expiration of the promotion eligibility list. *Id.* at 1221. The court considered, and properly distinguished, the holdings of the courts in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261 (1989); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); and *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074 (3d Cir. 1981),

cert. denied, 458 U.S. 1122 (1982); the termination or non-promotion in the latter cases "was a delayed but inevitable result of being denied tenure or not scoring well enough," *Bouman v. Block, supra*, 940 F.2d at 1221, while the Court in *Lorance* simply held that a claim of intentional discrimination in the *alteration* of contract rights accrued at the time of such alteration. *Lorance v. AT&T Technologies, Inc., supra*, 109 S.Ct. at 2265. In the instant case, by contrast, "not until the list expired was it certain that [Respondent] would not be promoted. She did not know until that date that she had suffered an injury." *Bouman v. Block, supra*, 940 F.2d at 1221. This factor distinguishes the instant case from the holdings relied upon by the Petitioners.

As described above, the different circumstances at issue in *Bronze Shields, Inc., v. New Jersey Department of Civil Service, supra*, 667 F.2d at 1074, rendered appropriate that court's use of the date of promulgation of an eligibility list for determining the timeliness of the charge. In that case, the plaintiffs had complained of the "defendants' refusal to *place them on* the hiring roster." *Id.* at 1083 (emphasis added). Thus, the Third Circuit reasoned that, as of the date of promulgation of the list, "plaintiffs knew they would not be hired by the . . . police department." *Id.* This reasoning is actually consistent with and supportive of that of the Ninth Circuit in the instant case; in the circumstances now under consideration, not until the list expired would the Respondent know she had not been promoted. *Bouman v. Block, supra*, 940 F.2d at 1221. Thus, the unlawful employment practice took place on that date and since her EEOC charge was filed within 300 days the action was timely filed. Until the Employer

intentionally allowed the list to expire, with her set to get the next appointment, Bouman could not know she had suffered an injury.

Courts of other jurisdictions which have had occasion to apply these principles to circumstances like those now at bar have reached the same conclusions as has the Ninth Circuit. *See, e.g., Guardian Association of New York City Police Department, Inc. v. Civil Service Commission of The City of New York*, 633 F.2d 232 (2d Cir. 1980), *aff'd*, 463 U.S. 582, *cert. denied*, 463 U.S. 1228 (1983); *Jordan v. Wilson*, 649 F.Supp. 1038 (M.D. Ala. 1986), *rev'd in separate proceeding on different issue*, 851 F.2d 1290 (11th Cir. 1988). Thus, the decision below is not only proper on the merits, but it is also supported by a consistent body of case law. There exists no conflict among courts of different jurisdictions nor any other special or important reason for this Court to grant certiorari on this issue.

Finally, the Respondent feels compelled to respond briefly to the Petitioners' characterization of the Respondent as a successful examinee who was harmed, not by the exam itself, but as a result of a failure to promote from the eligibility list. The Respondent was clearly not a successful applicant for a position she was not given. The contention that the administration of an exam, which results directly in the creation of an eligibility list, renders all ensuing harm the product of the list, and not of the exam, is a poor and nonsensical exercise in semantics. With respect to the Petitioners' suggestion that they are not parties properly held responsible for the processes here involved, that contention, not raised below, is not open for analysis here. *Ellis v. Dixon*, 349 U.S. 458, 460 (1966).

The Respondent respectfully suggests that no special or important issues have been raised meriting this Court's review. In fact, the tenor of certain of the Petitioners' fact-specific complaints clearly shows that this case falls within the rule that certiorari is to be granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393 (1923).

The Petitioners assert the vague and unsupported objection that the Respondent has challenged an examination – the 1977 exam – for which she did not apply. In its opinion below, the Ninth Circuit correctly followed the rule established by this Court, that "[a] plaintiff is not barred from bringing such an action where 'an application would have been a useless act serving only to confirm a discriminatee's knowledge that the job he wanted was unavailable to him.' " *Bouman v. Block, supra*, 940 F.2d at 1221 (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 367 (1977)). (The rationale behind this rule is explained, in part, by this Court's observation that "[t]he denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination." *International Brotherhood of Teamsters v. United States, supra*, 431 U.S. at 367). The firm establishment of this rule by this Court has been followed by the recognition and application of the rule in circuit courts throughout the country. *See, e.g., Underwood v. District of Columbia Armory Board*, 816 F.2d 769, 775 (D.C. Cir. 1987); *Ratliff v. Governor's Highway Safety Program*, 791 F.2d 394, 402 (5th Cir. 1986);

Babrocky v. Jewel Food Company, and Retail Meatcutters Union, Local 320, 773 F.2d 857, 867 (7th Cir. 1985) ("Because an employer may create an atmosphere in which employees understand that their applying for certain positions is fruitless, even nonapplicants can in appropriate circumstances qualify for relief under Title VII"); *Easley v. Empire, Inc.*, 757 F.2d 923, 930 n.7 (8th Cir. 1985) ("formal application for a job will be excused when a known discriminatory policy . . . deters potential jobseekers"); *Berkman v. City of New York*, 705 F.2d 584, 594 (2d Cir. 1983) ("Those who have been deterred by a discriminatory practice from applying for employment are as much victims of discrimination as are actual applicants whom the practice has caused to be rejected"); *Equal Employment Opportunity Commission v. American Telephone & Telegraph Co.*, 556 F.2d 167, 180 (3d Cir. 1977), *cert denied*, 438 U.S. 915 (1978). The decision below clearly conforms with a well-established rule of law; there exists no conflict among the circuits or with this Court so as to justify a grant of certiorari.

The district court in this case did, in fact, conclude that the Respondent "had demonstrated that she would have applied for the 1977 list but for the futility of competing with discriminatory practices" (Amended Memorandum After Trial, Aug. 16, 1985, App. B-5). The Ninth Circuit properly applied the standard set out in *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985), to uphold the lower court's findings of fact and credibility determinations regarding this issue. (This Court has established that a "clearly erroneous" standard applies to review of factual findings and that "due regard shall be given to the opportunity of the trial court to

judge the credibility of the witnesses." *Id.* at 573.) The Petitioners' current claim is apparently directed at certain evidentiary rulings and weighing of the evidence conducted below; these complaints clearly present no "special or important" reason for this Court to grant certiorari in this case. This Court does not sit to review such matters. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other"); *see also J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964) (the Court refused to engage in extended discussion of "questions of fact to be resolved at trial, not here"); *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it"); *Southern Power Co. v. North Carolina Public Services Co.*, 263 U.S. 508, 509 (1924) (the Court stated that the presentation of questions regarding the sufficiency of the evidence "would not have moved us" to grant certiorari).

The Petitioners' challenges to the certification of the class are similarly specious. As was correctly recognized by the Ninth Circuit, "[t]he determination as to whether to certify a class is committed to the discretion of the district court and will not be disturbed on appeal absent a showing of abuse of discretion." *Bouman v. Block, supra*, 940 F.2d at 1232 (citing *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977)). Contrary to the Petitioners' claim that the lower court failed to engage in a

"rigorous examination" of Rule 23(a) factors, as recognized by the Ninth Circuit, these factors were ordered fully briefed by the court and carefully considered at a hearing. At the hearing, the judge "reviewed each of the elements required for a class under Rule 23(a) and stated briefly why each was satisfied." *Bouman v. Block, supra,* 940 F.2d at 1232. This analysis will demonstrate that the lower court did not engage in an "across the board" certification, but, rather, gave consideration to each element necessary to maintain a class action suit. This analysis included a demonstration of common issues, problems, and harms existing among class members. The court expressly found that the challenged practices had the same adverse effect on all class members. Since the case involved common discriminatory practices and all claims fell within the same category of legal theory the court properly certified the class. Cf. *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 159 (1982) (if *"one* allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action"). The Petitioners' current claims are wholly without merit and do not warrant this Court's attention.

The above discussion demonstrates that the resolution of this case as decided below does not encourage litigation by persons without standing. The proper analysis of the standing issues, as engaged in by both courts below, reaffirms the fact that the courts will require the proper observance of the rules related to standing.

ADVERSE IMPACT

The Petitioners' claims regarding the circuit court's findings of discrimination are without merit and do not warrant review by this Court.

The Petitioners' complaint regarding the standard of review is incorrect. As recognized in the opinion below, this Court has gone so far as to explain that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983). It is well settled that "[t]he prima facie case method . . . was 'never intended to be rigid, mechanized, or ritualistic.' " *Id.* at 715 (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978)). Thus, in its opinion below, the court properly stated that "[o]nce a Title VII case proceeds to judgment the issue is no longer whether plaintiff has established a *prima facie* case, but whether there was discrimination." *Bouman v. Block, supra*, 940 F.2d at 1223.

The opinion below acknowledges that the standard would differ had the trial court found an absence of a prima facie case. *Id.* The court's opinion is thus perfectly consistent with the case relied upon by the Petitioners, *Clady v. County of Los Angeles*, 770 F.2d 1421 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986). The actions appealed from in *Clady* included the lower court's finding that no prima facie case had been established. *Id.* at 1426. Similarly, in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989), *only after* the trial court ruled against the plaintiffs did the circuit court hold that a

prima facie case had been made out. 109 S.Ct. at 2120. In *Atonio*, the Supreme Court itself did not specifically address the issue, which, as described above, had been settled in *Aikens*.

Contrary to the Petitioners' suggestion, the trial court did acknowledge that the federal guidelines (incorporating the "so-called 80 percent rule") are instructive, but not dispositive. *Bouman v. Block, supra*, 940 F.2d at 1225. The court noted that the question is whether the "statistical disparity is 'substantial' or 'significant' in a given case. *Id.* at 1225. The court concluded that both the adverse impact of the examinations and the bottom-line adverse impact were statistically significant and proven by "several generally accepted techniques." *Id.* at 1225. Moreover, as noted in the opinion below, courts do look at trends from past examinations to assess evidence of discrimination with respect to a total pass rate. *Id.* at 1226 (citing *Ezell v. Mobile Housing Board*, 709 F.2d 1376, 1382 (11th Cir. 1983); *Boston Chapter NAACP v. Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975)). The court's combination of the 1975 and 1977 results is thus proper.

With respect to the asserted "insubstantial differences" in the statistics, the Petitioners' argument comes perilously close to misleading. The court assessed the expert evaluations and concluded that they showed statistical significance. *Bouman v. Block, supra*, 940 F.2d at 1226. Importantly, the court rejected the Petitioners' interpretation of prior Ninth Circuit authority; it held both that the combination of small sample size and small success rate calls into question the significance of an 80% rule violation and that a showing of significance at the .05

level distinguishes the instant case from *Contreras v. The City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). The Petitioners' current attempt to foist upon this court their own interpretation of Ninth Circuit authority which has been rejected by that circuit well merits this Court's refusal to take up this case.

Finally, the Petitioners have failed to observe that the Ninth Circuit's rejection of this contention by the Petitioners is based, in part, on the trial court's crediting the Respondent's experts with respect to a possible correlation between disparate performance and experience. *Bouman v. Block, supra*, 940 F.2d at 1227. The lower court's factual findings are entitled to deference and constitute no proper basis upon which to seek certiorari. *Anderson v. City of Bessemer City North Carolina, supra*, 470 U.S. at 573; *National Labor Relations Board v. Pittsburgh Steamship Co., supra*, 340 U.S. at 503.

RETALIATION

The Petitioners' argument concerning retaliation completely ignores the governing precedent firmly established in the Ninth Circuit and relied upon in the decision below. Based upon the principles set out in *Ramirez v. National Distillers & Chemical Corp.*, 586 F.2d 1315 (9th Cir. 1978), and *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569 (9th Cir. 1973), the court below held that the Respondent's retaliation claim of March 1978 was "reasonably related" to her prior filed discrimination claim of January 1978 and rejected the contention that a separate

retaliation charge should have been filed with the EEOC. *Bouman v. Block, supra,* 940 F.2d at 1229. In so concluding, the court followed its own precedent, which dictates that "[w]hen an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charges before the EEOC." *Oubichon v. North American Rockwell Corp., supra,* 482 F.2d at 571. The decision below is also consistent with the conclusions of other circuit courts which have had occasion to state that retaliation claims such as those involved in the instant case need not be the subjects of separate EEOC filings. *See, e.g., Ang v. The Procter & Gamble Co.,* 932 F.2d 540, 546-47 (6th Cir. 1991); *Baker v. Buckeye Cellulose Corporation,* 856 F.2d 167, 168-69 (11th Cir. 1988); *Gupta v. East Texas State University,* 654 F.2d 411, 413-14 (5th Cir. 1981); *Goodman v. Heublein, Inc.,* 645 F.2d 127, 131 (2d Cir. 1980). There is no conflict among the circuits regarding this issue; a grant of certiorari is not warranted.

Finally, it should be noted that the decision of the court in *Ruggles v. California Polytechnic State University,* 797 F.2d 782 (9th Cir. 1986), merely discusses the nature of a retaliation claim; it does not address the issue at hand (which issue has, as discussed above, been addressed elsewhere by the Ninth and other circuits). The *Ruggles* decision is thus inapposite; it in no way affects an analysis of the merits of the question and provides no conflicting counterprinciple which might warrant the Court's consideration.

CONCLUSION

Since the court of appeals correctly applied the law, there is no issue of national importance worthy of the attention of this Court, and the decision below turns on its own facts, and, as a precedent, will affect relatively few other litigants, the petition for writ of certiorari should be denied.

DATED: November 15, 1991

Respectfully submitted,

DENNIS MICHAEL HARLEY

Counsel for Respondents

APPENDIX "A"

COMPUTER COUNTS OF LOS ANGELES COUNTY SERGEANT AND DETECTIVE SERGEANTS SELECTION PROCESS[b]

YEAR	STEP	ISSUE	STANDARD DEVIATIONS	PROBABILITY	ONE CHANCE IN	CASE
1975	Available vs. Applied (H)	Discouragement & Experience Requirements	4.61	.000004	242,671	48
1975	Available vs. Applied (G)	Discouragement & Experience Requirements	5.73	.00000001	99,000,000	49
1975	Applied vs. Took Written	Discouragement	2.43	.015113	66	50
1977	Available vs. Applied (H)	Discouragement & Experience Requirements	5.08	.00000037	2,700,000	60
1977	Available vs. Applied (G)	Discouragement & Experience Requirements	6.52	.000000000068	14,000,000,000	61
1975	Took Written vs. Passed	Passing Written	2.29	.0121773	46	51
1975-77	Applied* vs. Took Written	Discouragement	2.83	.004618	217	76
1975-77	Took Written* vs. Passed Written and Made AP	Passing of Written	3.07	.002147	466	77
1975-77	Took Written* vs. Passed Written & Passed AP & Took Oral	Passing Two Cutoffs (Written & AP)	2.23	.025963	39	97
1975	Available vs. Promoted	Bottom Line	2.70	.006995	143	58
1977	Available vs. Promoted	Bottom Line	2.05	.040251	25	71
1975 - 1977 Counting Candidates only once						
	Applied vs. Promoted	Bottom Line	2.31	.020649	48	89
	In Pool vs. Applied	Discouragement & Experience Requirements	6.24	.00000000042	2,300,000,000	90
	Applied vs. Took 1 Written	Discouragement	2.93	.003363	297	91
	Took 1 Written vs. Passed 1 Written	Passing Written	3.26	.001100	909	92
	Took Written vs. Passed Both Written & AP Cutoffs	Pass 2 Cutoffs	2.44	.014603	68	96

*and not promoted early

REVISED 4/15/86

APPENDIX "B"
ADVERSE IMPACT SUMMARY

SELECTION PROCESS STEPS		A 1975 M	A 1975 F	A 1975 T		B 1977 M	B 1977 F	B 1977 T		C[a] 1975 ADDED to 1977 M	C[a] 1975 ADDED to 1977 F	C[a] 1975 ADDED to 1977 T	D 1975 or 1977 M	D 1975 or 1977 F	D 1975 or 1977 T
Deputy I, II, III, IV	(1974)	3479	364	3843[d]	(1976)	3596	477	4073[e]	(1975)	3619	415	4034[f]	–	–	–
Applied		1506	101	1607		1628	141	1769		3134	242	3376	2159	190	2349
Did Not Promote Early		–	–	–		1616	141	1757[e]		3122	242	3364	–	–	–
Took Written Test		1312	79	1391		1259	102	1361		2571	101	2752	1826	145	1971
Took written Test Not Promoted Early		–	–	–		1254	102	1356		2566	101	2747			
Passed Cutoff for Written Test (70% 1975) (70% 1977)		491	19	510		562	34	596		1053	53	1106	849	48	897
Passed Cutoff for Written and Not Promoted Early		–	–	–		558	34	592		1049	53	1102			
Appraisal of Promotability Made (AP)		487	19	506		558	34	592		1045	53	1098	846	48	894
Passed Cutoff of AP and Written (53.78 1975) (53.75 1977)		250	10	260		331	18	349		581	28	609	502	24	526
Took Oral Interview		250	10	260		329	18	347		579	28	607	513	28	541
Placed on Eligible List		249	10	259		331[f]	18	349		580	28	608	514	28	542
Promoted		127	4	131		93	5	98		220	9	229	220	9	229

Notes: See attached.